[*Translation from the German Language*]

Deposited on 14 February 2018 – 07:52

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(Federal coat of arms)

REPUBLIC OF AUSTRIA
HIGHER REGIONAL COURT (*OBERLANDESGERICHT*) OF LINZ

IN THE NAME OF THE REPUBLIC

In the legal matter of the Claimant, **Federal Fiscal Enterprise (FKP) Sojuzplodoimport**, Kutuzovskiy Prospect, 34 bld. 21, , 121170 Moscow, Russia, represented by Binder Grösswang Rechtsanwälte GmbH in Vienna, versus the Defendant, **Spirits International B.V.**, 3 Rue de la Vallée, 2661Luxembourg, represented by Brauneis Klauser Prändl Rechtsanwälte GmbH in Vienna, matter in dispute: injunctive relief, abatement and rendering of accounts (value in dispute: EUR 112,000.00), the Higher Regional Court of Linz, sitting in chambers as a Court of Appeal, presided by judge Dr. Paul Aman and attended by Dr. Werner Gratzl and Mag. Christine Mayrhofer, has issued the following judgment concerning the Defendant's appeal against the decision passed by the Regional Court (*Landesgericht*) of Linz on 12 August 2014, 5 Cg 206/04w-168:

The appeal is granted anew and the contested decision is hereby modified so as to read as follows:

"The Claimant's requests

1) that the Defendant be ordered

a) to refrain from using the "Stolichnaya" and/or "Moskovskaya" trademarks or any other mark that is similar enough to the said trademarks to be likely to be confused with them, in commercial transactions,

b) to agree to the transfer of the Austrian trademarks no. 77467 and no. 77468 to the Claimant, or, alternatively, to agree to the removal of the faulty entry transferring the trademark rights in accordance with the decision of the Austrian Patent Office of 3 May 1994 and to agree to the removal of all subsequent trademark transfers, so that the entry once again shows the legal entity V/O Sojuzplodoimport originally registered in the trademark register as the trademark holder, and

c) to render accounts concerning all products sold under the "Stolichnaya" trademark, giving the numbers of items sold and their prices, to agree to the verification of these accounts by an expert, to pay the appropriate remuneration calculated in accordance with the provisions of sec. 53 para 1 of the Austrian Trademark Protection Act (Markenschutzgesetz, MSchG), to pay damages in accordance with sec. 53 para 2 lit 1 in conjunction with para 3 of the Austrian Trademark Protection Act, and to surrender the profits obtained according to sec. 53 para 2 lit 2 of the Austrian Trademark Protection Act, the exact quantification of these claims to be reserved until after accounts shall have been rendered;

alternatively:

2) that the court declare

a) the transfer of the Austrian trademarks number 77467 and number 77468 in accordance with the decision of the Austrian Patent Office of 13 May 1994 and the amending decision of 8 June 1994 to have been invalid, and

b) the Claimant to be the legally entitled holder of the rights afforded by the Austrian trademarks number 77467 and number 77468, or, alternatively, to declare that the Defendant is not the legally entitled holder of the said trademark rights,

*are **dismissed**.*

The decision as to costs is hereby reserved pursuant to sec. 52 para 1 and 2 of the Austrian Code of Civil Procedure until a final and absolute decision shall have been passed in this matter."

The value in dispute exceeds EUR 300,000.00.

An ordinary appeal on points of law (*ordentlicher Revisionsrekurs*) will bepermissible .

STATEMENT OF REASONS:

Indisputable facts

V/O Sojuzplodoimport was established by an ordinance issued by the Ministry of Foreign Trade of the Union of Socialist Soviet Republics (USSR) of 30 June 1966 (V/O means "All Union Association", while Sojuzplodoimport means "Union Fruit Import"). This Soviet enterprise – a government undertaking – applied for registration of the Austrian trademarks no. 77467, "Moskovskaya", and no. 77468, "Stolichnaya", with the Austrian Patent Office on 22 April 1974 (Appendices ./H und ./i).

On 5 January 1990, VVO Sojuzplodoimport (VVO = "All-Union Foreign Economic Association") was established. This company took up its commercial activities under the direction of the State Commission for Food and Purchase of the USSR (also a government enterprise) and was the legal successor (albeit not registered in the Austrian Trademark Register) of V/O Sojuzplodoimport as far as the aforementioned Austrian trademark rights are concerned.

Until 30 November 1991, state-owned enterprises organised in the legal form of a VVO reported directly and exclusively to a Union authority (that is to say, an authority of the USSR), which, until that time, was also responsible for the privatisation of the government enterprises and the supervision of such privatisation. As of 1 December 1991, the assets and responsibilities of almost all Soviet central authorities were transferred to authorities of the Russian Socialist Federative Soviet Republic (RSFSR; one of the Union republics of the USSR, from which the Russian Federation emerged as a sovereign "successor state") in the course of the dissolution of the USSR. At that time, VVO Sojuzplodoimport was placed under the control of the Ministry of Trade and Material Resources of the RSFSR.

From the summer of 1990, the establishment of joint stock companies was governed, inter alia, by the Soviet Regulation on joint stock companies and limited liability companies (here abbreviated withUSSR Companies Regulation). This provided several possibilities for the creation of joint stock companies, including the option of the conversion – involving the transfer of assets by way of universal succession – of a state-owned enterprise into a joint-stock company. According to Article 46 (USSR Companies Regulation), the special requirements for such a conversion were 1) the existence of a state-owned enterprise, 2) a joint decision by the labour collective and the responsible government authority concerning the conversion, 3) an evaluation of the assets of the state-owned enterprise by a Valuation Commission and 4) a subscription of shares in a public procedure or by persons named in the joint decision of the labour collective and the responsible government authority. The said Valuation Commission was required to consist of representatives of 1) the government authority responsible or co-responsible for the conversion, 2) the fiscal authorities and 3) the workforce. There were no binding criteria to govern the evaluation of assets to be carried out by the said Commission. The demand of an Evaluation Commercial including representatives of the fiscal authorities was a control measure intended to compensate for the lack of binding criteria for evaluation. According to Article 46 para 5 of the USSR Companies Regulation, the joint-stock company created as a result of the conversion was the legal successor and, therefore, the owner of the entire assets of the state-owned enterprise from which it had emerged, irrespective of whether or not the articles of incorporation of the joint-stock company (expressly) provided for such universal succession.

In cases where a joint-stock company was not created by conversion, but (simply) by formation of a new company, it could only acquire property by way of transfer of individual assets (and not by way of universal succession). According to Article 38 of the USSR Companies Regulation, the setting up of a joint-stock company required four steps: 1) declaration of the intention to set up a joint-stock company on the part of the founders, 2) subscription of the shares, 3) the holding of a founders' conference and 4) official registration of the company. To obtain such registration, submission of the following documents listed in Article 9 of the USSR Companies Regulation was required: an application for registration, a notarised copy of the foundation documents and, in the case of joint-stock companies established by way of conversion from a state-owned enterprise, a copy of the joint decision of the labour collective and the responsible government authority.

The management and workforce of VVO Sojuzplodoimport, who were aware of the fact that, at the time, the Union authorities still had jurisdiction over such procedures, intended, in the summer of 1990, to privatise the state-owned enterprise. For this purpose, VVO Sojuzplodoimport was to be converted into the – newly formed – VAO Sojuzplodoimport (VAO = foreign economic joint stock company), which was to be considered, according to the intentions of the persons involved, as the legal successor of VVO Sojuzplodoimport. On 20 September 1990, a meeting of the labour collective of VVO Sojuzplodoimport was held in the presence of a representative of the State Commission for Food and Purchase with the Council of Ministers of the USSR, which was attended by 130 employees of the company. During this meeting, proposal by the management and the council of the labour collective concerning the formation of VAO Sojuzplodoimport out of VVO Sojuzplodoimport was put to the vote. The result was 129 votes for the formation of VAO Sojuzplodoimport, no votes against and one abstention (Minutes, Appendix ./138). In view of this result, the following joint resolution of the labour collective of VVO

Sojuzplodoimport and the State Commission for Food and Purchase with the Council of Ministers of the USSR was passed on the same day (20 September 1990) (Appendix./13x):

"1. The All-Union Foreign Economic Association Sojuzplodoimport [= VVO Sojuzplodoimport] shall be converted into the Foreign Economic Joint Stock Company Sojuzplodoimport [= VAO Sojuzplodoimport].

2. The conversion shall be effected by way of the issuance of shares (or share certificates representing their value) for a total amount consisting of the company's share capital according to its articles of incorporation and of the value of the assets of VVO Sojuzplodoimport. The shares shall be divided among the enterprises and organisations that have confirmed their participation in the joint-stock company, and also among the members of the labour collective of the Association.

3. To identify the assets of VVO Sojuzplodoimport and assess their value, a commission shall be set up, consisting of representatives of the State Commission for Food and Purchase with the Council of Ministers of the USSR, of the fiscal authorities and of the labour collective of the Association.

4. VAO Sojuzplodoimport shall be considered as the legal successor of VVO Sojuzplodoimport.

5. The foundation documents shall be drawn up and the measures required for the conversion of VVO Sojuzplodoimport into the joint-stock company shall be carried out by the management of the Association."

This resolution was signed on behalf of the State Commission for Food and Purchase with the Council of Ministers of the USSR by its deputy chairman, and on behalf of the labour collective of VVO Sojuzplodoimport by the general manager, Sorotchkin.

On 19 December 1990, a meeting of the founders [and future shareholders] of VAO Sojuzplodoimport was held. According to the Minutes (Appendix./13bx), the following report was presented there:

> *"Mr. W.W. Gorbunow [a representative of VVO Sojuzplodoimport] reported that the main aim of the transition to the market is to be denationalisation and decentralisation of state-owned property. One of the last ordinances of the USSR Council of Ministers concerning the de-monopolisation of the national economy . . . provides for the conversion of the state-owned foreign trade associations into joint stock companies or other forms of property. VVO Sojuzplodoimport began to consider the questions associated with the alteration of its status in mid-1990. Share ownership is governed by the Ordinance of the Council of Ministers number 590 of 19 June 1990. This is a document of fundamental importance. ...*
>
> *Concerning the organisation of the financial activities of the joint-stock company, W.W. Gorbunow reported that the main source of income of the VAO will be the commissions obtained from the suppliers of the export goods and the purchasers of the import*

goods in accordance with the contracts between the VAO and its customers. In this way, the turnover of goods will be of decisive importance to the income generation of the VAO. For this reason, the choice of participants in the VAO to be established was guided by the necessity of including those companies that are able to guarantee a maximum volume of exports and imports to be transacted via the VAO.

The preliminary calculations show that the company will be able, if the existing volume of trade of VVO Sojuzplodoimport can be maintained .... to guarantee a dividend on the shares of 10%, assuming that the share capital will be 15 million rubles. Based on this assumption, it has been suggested that the share capital should not be increased and that it should be limited to 15 million rubles. The amounts of the shares to be allotted to the founders ... were corrected and a decision was made concerning the amount of the initial contributions of the other shareholders ..."

After discussion of the draft articles of incorporation and the list of shareholders of the VAO Sojuzplodoimport [about to be established], the founders signed the contract by which they concluded the following agreements (Appendices ./13b and ./13bx):

"1. The establishment of the foreign trade joint-stock company [= VAO Sojuzplodoimport] in the Soviet Union, with an initial share capital according to the articles of incorporation corresponding to 15 million rubles, divided into 15,000 shares, with a value of of 1,000 rubles per share. The shares shall be divided among the founders in accordance with the schedule set out in the Appendix to the present Contract.

2. A minimum of 50% of the value of the shares shall be paid in by the founders by 15 January 1991, the payments to be made into the clearing account of VVO Sojuzplodoimport, no. ... .

3. The founders hereby transfer to the All-Union Foreign Trade Association Sojuzplodoimport [= VVO Sojuzplodoimport] all their powers of attorney for the establishment of the joint-stock company ...

4. The founders shall be jointly and severally liable vis-a-vis those persons who have subscribed the shares, and also vis-a-vis third parties, for all liabilities arising during the period up to the registration of the company."

On 5 September 1991, the actual founders' meeting (conference of founders) of VAO Sojuzplodoimport was held; during this meeting, the company was established and its articles of incorporation adopted. The meeting was attended by a total of 21 founders, including VVO Sojuzplodoimport (represented by its general manager, Sorotchkin) and other state-owned enterprises. There were no representatives of the authorities among the founders. However, the meeting was attended by a representative of the Main Trade Office of the [Soviet] Ministry of Defence and by a representative of the Ministry of Agriculture and Food of the RSFSR. These two government representatives were elected to the board of management of VAO Sojuzplodoimport, together with 10 other persons; the former general manager of VVO Sojuzplodoimport, Sorotchkin, was unanimously elected chairman of the board. The capital of VAO Sojuzplodoimport was declared to be 17 million rubles, and this

declaration was approved. Furthermore, the results of the subscription of shares were also approved (Minutes, Appendix./13cx). The articles of incorporation adopted at this founders' meeting of VAO Sojuzplodoimport contain the following provision in their Item 4 (Appendix ./15):

> *"VAO Sojuzplodoimport shall not be liable for the obligations of its shareholders, and the shareholders shall not be liable for the obligations of VAO Sojuzplodoimport. The liability of the shareholders of the VAO shall be limited to the amount of their respective initial contribution. VAO Sojuzplodoimport is the legal successor of VVO Sojuzplodoimport."*

On 4 October 1991, the articles of incorporation where confirmed and/or approved by the deputy Minister for Foreign Trade of the USSR, who noted "agreed" on the first page of the articles.

By a letter dated 25 December 1991, addressed to the chairman of the registration authority of the City of Moscow (received by the said authority on 13 January 1992), VAO Sojuzplodoimport submitted an application for registration dated 13 January 1992 (Appendix./RRR.RR). There is no evidence as to whether this application (contrary to its ostensible date) was already drawn up and sent off to the registration authority on 25 December 1991. The following is an extract from this application:

> *"3. The approved capital of VAO Sojuzplodoimport shall be 70 million rubles and shall be divided into 17,000 ordinary registered shares with a nominal value of 1,000 rubles each.*
>
> *4. The shares of VAO Sojuzplodoimport shall be divided among its founders in the following way:*
>
> *All Union Foreign Trade Association Sojuzplodoimport [= VVO Sojuzplodoimport] - 4,840 shares à 4.840.000 rubles ...*
>
> *5. This application has been drawn up in 55 copies, with each founder receiving one copy, the Ministry of Finance of the RSFSR receiving one copy and the Registration Authority of the City of Moscow receiving two copies."*

An undated further application for the registration of VAO Sojuzplodoimport, referred to as "2nd version", states as follows: "*The founders – the legal entities listed in Appendix no. 1 to the present application – have decided to establish the foreign trade joint-stock company Sojuzplodoimport (VAO Sojuzplodoimport) by way of the conversion of the All Union Foreign Trade Association Sojuzplodoimport (VVO Sojuzplodoimport). VAO Sojuzplodoimport is the legal successor of VVO Sojuzplodoimport* (Appendix/19). It has been impossible to ascertain when this application was drawn up and whether and/or, if applicable, when it was delivered to the registration authority in Moscow.

By a confirmation dated 20 January 1992 (Appendix./16), VAO Sojuzplodoimport was registered in the Moscow commercial register of the RSFSR. By a certificate of 14 April 1992 (Appendix ./20), the Ministry of Foreign Trade of the RSFSR confirmed that VAO Sojuzplodoimport had been registered in the governmental register of participants in the

foreign trade activities of the RSFSR and that it was carrying out export-import transactions in accordance with the list of goods referred to on the relevant register card. 24 June 1992, VAO Sojuzplodoimport was registered in the Russian government register of joint-stock companies (Appendix at/21).

On 19 April 1994, a communication filed by a patent attorney informed the Austrian Patent Office (Appendix./AA) of the name change of the holder of the Austrian trademarks "Moskovskaya" (No 77467) and "Stolichnaya" (No 77468) to *Foreign Econmoic [sic] Joint Stock Company Sojuzplodoimport* [=VAO Sojuzplodoimport]. The Patent Office acknowledged this alteration of the firm name by a decision dated 13 May 1994 (Appendix ./BB) and changed the name of the trademark holder by a corrigendum notice (*Berichtigungsbeschluss*) dated 8 June 1994 (Appendix./CC) to *Foreign Economic* [instead of Econmoic] *Joint Stock Company* Sojuzplodoimport.

In the year 1996, VAO Sojuzplodoimport was converted into a closed joint stock company (ZAO), and the name of the enterprise was changed to VZAO Sojuzplodoimport. In 1998, the legal form was again altered and the company became a so-called public joint stock company (OAO) under the firm name of ZOAO Sojuzplodoimport (foreign trade public joint stock company Sojuzplodoimport; Appendix./35). Finally, at the beginning of the year 2000, the company – still in the legal form of a public joint stock company (OAO) – changed its firm name to OAO Plodovaya Kompaniya (Appendix./36).

In 1997, a new closed joint stock company (ZAO), under the firm name of ZAO Sojuzplodimport (not to be confused with the above-mentioned VZAO Sojuzplodoimport), was established. By a contract dated 26 December 1997 (Appendix./ii), VZAO Sojuzplodoimport assigned its Russian trademark rights – including the "Stolichnaya" and "Moskovskaya" trademarks – to the (newly established) ZAO Sojuzplodimport. An amendment to this contract, dated 12 January 1998, provided an obligation on the part of VZAO Sojuzplodoimport also to assign foreign trade marks and trademark applications to ZAO Sojuzplodimport in the future; this obligation was subsequently complied with at the beginning of 1998. The agreed overall purchase price for the assignment of the trademarks was 1,700,000,000 rubles. The trademarks registered in the Austrian Trademark Register under numbers 77467 and 77468, "Moskovskaya" and "Stolichnaya", were transferred to ZAO Sojuzplodimport by a written transfer document (Appendix ./JJ). The relevant entry in the Trademark Register was effected by a decision of the Austrian Patent Office of 22 September 1998 (Appendix./UU), in reply to an application dated 3 July 1998 (Appendix./TT).

By a contract dated 12 April 1999 (Appendix./MM), ZAO Sojuzplodimport assigned the trademark rights to which it was entitled to the Defendant for a price of USD 800,000.00; the assigned trademark rights also included the rights to the Austrian trademarks, numbers 77467, "Moskovskaya" and 77468, "Stolichnaya" (confirmation of 26 October 1999, Appendix./NN). The Austrian Patent Office then transferred these two trademarks to the Defendant by a decision dated 8 June 2001 (Appendix./VV); since that date, the Defendant has been the registered holder of these trademarks.

Starting in the year 2000, measures for the reintegration of privatised state property were initiated in the Russian Federation [under the new president, Vladimir Putin, who replaced Boris Yeltsin]; these measures also affected the sector that manufactures and sells

spirits (Appendix./31). Based on a complaint filed in November 2000 by the deputy attorney general of the Russian Federation "for the protection of the interests of the state and of society" against OAO Plodovaya Kompaniya (the former VAO Sojuzplodoimport), proceedings were initiated before the court of arbitration of the City of Moscow, which focused on the question of the validity of the provision in the articles of incorporation of OAO Plodovaya Kompaniya (formerly VAO Sojuzplodoimport) according to which it had become the legal successor of VVO Sojuzplodoimport. By a decision of the aforementioned court of 21 December 2000 (Appendix./YY), it was decided that this provision of the articles of incorporation is invalid. The Court of Appeal allowed the appeal filed against this decision, set aside the decision of the court of first instance and discontinued the proceedings. This decision was, in turn, contested by the deputy attorney general of the Russian Federation; the president of the Supreme Arbitration Court of the Russian Federation, by a decision dated 16 October 2001 (Appendix./ZZ), agreed with the deputy attorney general, set aside the decision of the Court of Appeal and reinstated the decision of 21 December 2000 of the court of arbitration of the City of Moscow, which was the court of first instance. The reasons given for this decision were the following:

> *"When the court of first instance granted the claim, it assumed that there were no reasons, at the time of the formation of closed joint stock company Sojuzplodoimport – hereinafter referred to as VAO Sojuzplodoimport (legal successor [*[recte: legal predecessor] *of Plodovaya Kompaniya – to include a provision in the articles of incorporation stating that it was the legal successor of the All Union Foreign Trade Association [= VVO] Sojuzplodoimport.*
>
> *The decision of the court was set aside as far as this point was concerned because the Court of Appeal had concluded that the attorney general, when filing the action for the protection of the national interest, had failed to state the identity of the claimant in these proceedings. The attorney general himself is not entitled to act independently in the name of the state.*
>
> *However, this conclusion contradicts the record and applicable legislation.*
>
> *As the court file shows, the claims were brought by the attorney general in the interests of the Russian Federation. Pursuant to sec. 41, Part 1, of the Rules of Arbitration of the Russian Federation, the attorney general is entitled to bring actions for the protection of the interests of the state and of society before the court of arbitration.*
>
> *This means that the decision of the Court of Appeal, by which the decision of the court of first instance was partially set aside and proceedings were discontinued, is contrary to the applicable laws and must therefore be reversed.*
>
> *Sec. 1 of the Law of the Russian Federation of 30 October 1990 "on securing the economic basis for the sovereignty of the RSFSR" states that property owned by the State that is located within the territory of the RSFSR, including the assets of state-owned companies, facilities, organisations, including those under the control of the Union, as well as their operating assets and investments or other All-Union funds or assets that are being administered by Union authorities, is the property of the RSFSR.*

Consequently, the assets of the state-owned enterprise VVO Sojuzplodoimport were the property of the RSFSR, which means that these assets could only be disposed of in the manner provided by the law.

VAO Sojuzplodoimport, the memorandum and articles of association of which contained a provision to the effect that the company is the legal successor of VVO Sojuzplodoimport, was registered as a legal entity with the Moscow Registration Chamber on 20 January 1992.

According to sec. 37 lit 2 of the Law of the RSFSR of 25 December 1990 "On Enterprises and entrepreneurial activities", which was applicable at the time, all other property rights and obligations of the old enterprise will be transferred to the new one in case of a conversion of a company.

Consequently, the inclusion of a legal succession clause in the memorandum and articles of association of VAO Sojuzplodoimport would have been justified if this company had been set up as a result of the conversion of the state-owned enterprise VVO Sojuzplodoimport.

Sec. 4 of the Law of the RSFSR of 3 July 1991 "On the privatisation of state-owned and municipal enterprises in the RSFSR" provided that the conversion of a state-owned enterprise into another type of company required a resolution of the State Committee for the State Treasury of the RSFSR.

The file shows that no resolution of the State Committee for the State Treasury of the RSFSR was ever passed regarding the conversion of the state-owned enterprise VVO Sojuzplodoimport.

It is obvious from the company documents of VAO Sojuzplodoimport that the company was newly established by several legal entities (including the state-owned enterprise VVO Sojuzplodoimport).

Since VAO Sojuzplodoimport was established by way of the formation of a new company and not by way of conversion, the court of first instance was right in its conclusion that the clause in the memorandum and articles of incorporation stating that this company is the legal successor of VVO Sojuzplodoimport is invalid."

Both the court of arbitration of the City of Moscow, which was the court of first instance, and the president of the Supreme Court of the Russian Federation based their decisions on Russian (and not on Soviet) privatisation law.

By a decision of the court of arbitration of the City of Moscow of 30 January 2002 (Appendix./AAA), in proceedings initiated by the attorney general of the Russian Federation "represented by the Ministry of Agriculture of the Russian Federation" versus ZAO Sojuzplodimport and OAO Plodovaya Kompaniya, the contract between these two companies of 26 December 1996 on the assignment of trademarks (including "Stolichnaya" and "Moskovskaya"), as well as the amendment to this contract of 12 January 1998, were declared to be invalid. In its statement of reasons, the decision refers to the decision of the

president of the Supreme Court of Arbitration of the Russian Federation of 16 October 2001 (Appendix./ZZ), and states as follows:

> *"Taking into account the fact that the original holder of the trademark, VVO Sojuzplodoimport, never assigned its trademark to any organisation, including the Defendant, and that OAO Plodovaya Kompaniya is not the legal successor of the foreign trade closed joint stock company Sojuzplodoimport, the foreign trade company ZAO Sojuzplodoimport (now the open joint stock company Plodovaya Kompaniya) is not the owner of the trademarks registered in its name . . .*
>
> *The Defendant's objections are dismissed for the following reasons:*
>
> *The original holder of the trademarks listed, the foreign trade company for the import and export of foods and plant-based agricultural products, was never dissolved, but, as a state-owned enterprise under the control of the Ministry of Agriculture, was converted several times, a fact that can be proved by regulations, ordinances and the memorandum and articles of incorporation of the company.*
>
> *The court also dismisses the Defendant's objection that the Ministry of Agriculture of the Russian Federation has no standing to sue.....Pursuant to sec. 166 of the Civil Code of the Russian Federation, any person affected is entitled to demand a declaratory judgment establishing the invalidity of a legal transaction."*

The Court of Appeal confirmed this judgment by a decision dated 28 March 2002 (Appendix at/BBB).

The Ministry of Agriculture of the Russian Federation assumed (at any rate as from the year 2001) that VVO Sojuzplodoimport had continued to exist, and, in 2001, converted it into a federal state-owned unitary enterprise under the firm name of FGUP VO Sojuzplodoimport. By an order from the government of the Russian Federation of 29 December 2001 (Appendix/A), the "*federal fiscal enterprise "Sojuzplodoimport" with operative management rights"* – that is to say, the present Claimant – was established and also placed under the control of the Ministry of Agriculture. On 9 April 2002, it was registered in the Moscow commercial register (Appendix./T). A decree of the government of the Russian Federation of 4 July 2002 (Appendix./L) granted it the rights to use and dispose of (in the name of the Russian Federation) certain trademarks for alcoholic and alcohol - containing products – including "Stolichnaya" and "Moskovskaya" –; these rights also extended to the relevant foreign trademarks and the exploitation of the relevant trademark rights abroad. By a government decree of 6 January 2005 (Appendix./123), the Claimant was ordered to enforce the interests of the Russian Federation before the courts with regard to the questions of restoration and protection of the rights of the Russian Federation to trademarks for alcoholic products abroad, and to obtain registration of the Russian Federation's rights to these trademarks in the relevant foreign countries.

On 3 October 2005, the Claimant and FGUP VO Sojuzplodoimport signed an agreement regarding the "Stolichnaya" and "Moskovskaya" trademarks entered in the Austrian Trademark Register (Appendix ./NNNN), which included, inter alia, the following provisions:

"Transfer of trademarks

1. *The parties agree that the trademarks shall be the property of FKP Sojuzplodoimport [i.e., the Claimant]. Purely as a precautionary measure in case the trademarks should, for any reason whatsoever, remain the property of FGUP VO Sojuzplodoimport, FGUP VO Sojuzplodoimport (formerly V/O Sojuzplodoimport, formerly VVO Sojuzplodoimport) hereby transfers all rights in the trademarks to FKP Sojuzplodoimport and FKP Sojuzplodoimport Russia assumes all the rights in the trademarks.*

2. *The transfer of trademark rights to FKP Sojuzplodoimport ..... thus effected by FGUP VO Sojuzplodoimport includes the transfer to FKP Sojuzplodoimport of all rights and obligations related to the trademarks."*

Subject matter and proceedings to date of the present legal dispute

By its Complaint filed on 16 July 2004 (and subsequently modified, as to its pages 34 et seq.), the Claimant requested the decision as represented in the operative provisions hereof. Put briefly, it claimed that the privatisation process 1990/1991 had not constituted a valid conversion of VVO Sojuzplodoimport into VAO Sojuzplodoimport, due to various defects (particularly also in view of the failure to have the assets of the enterprise valued by a Valuation Commission pursuant to Article 46 of the USSR Companies Regulation), but that the latter had been newly established without becoming the legal successor of VVO Sojuzplodoimport. As a result, the material rights under the "Moskovskaya" and "Stolichnaya" trademark, in particular, remained the property of VVO Sojuzplodoimport – still in existence –, so that VAO Sojozplodoimport never acquired the rights to these trademarks and, consequently, was never able to assign them effectively. In view of this, the transfers of the trademarks, as registered from 1994 onwards in the Austrian Trademark Register (first to VAO Sojuzplodoimport, then, in 1998, to ZAO Sojuzplodimport and finally, in 2001, to the Defendant), lacked a valid legal basis and were incorrect as far as their content is concerned. According to the Claimant, the actual, substantially entitled trademark holder, which is now managing the trademark rights of FGUP VO Sojuzplodoimport and holding the rights of use and disposal in respect of the trademarks on behalf of the Russian Federation, is the Claimant itself.

The Defendant requested dismissal of the complaint and argued that the conversion procedure had been carried out correctly and had resulted in universal succession, so that it had acquired the two Austrian trademarks in a legally valid manner. Apart from this, the Claimant has no standing to sue based on alleged defects of the privatisation procedure; furthermore, any such defects have become statute-barred and there is no basis for the claims raised by the Claimant in Austrian trademark law.

By the contested judgment of 12 August 2014 (reference no. (*ON*) 168), the court of first instance granted the principal claims, while specifying that the obligation of rendering accounts is to be understood as referring to all products sold *in Austria* and labelled with the "Stolichnaya" trademark.

In its decision of 10 December 2014 (reference no. (*ON*) 172), the Higher Regional Court of Linz as the Court of Appeal admitted the appeal against this judgment filed by the Defendant and modified the decision of the court of first instance so as to dismiss the Claimant's claim. The main reason underlying this decision was that the court found that the Defendant's plea of the statute of limitations had merit because the 10-year period provided by the Civil Code of the Russian Federation for claiming the invalidity and/or nullity of legal transactions (including privatisation processes) had started to run in 1992, if not earlier, and that it had therefore expired already before the date on which the complaint was filed (16 July 2004).

The Claimant then appealed to the Austrian Supreme Court, which set aside this judgment on appeal by a decision dated 11 August 2015 (case no. 4 Ob 30/15p (reference no. (*ON*) 176) and ordered the Court of Appeal to issue a new decision on the appeal after having cleared up some unresolved issues. The Supreme Court approved the legal conclusions arrived at by the Court of Appeal, according to which the invalidity of the "transformation" (of VVO Sojuzplodoimport into VAO Sojuzplodoimport) aimed at a universal succession could no longer be invoked by the Claimant (as the basis and prerequisite of its claim) because the deadline provided in such cases under Russian law had already expired. It did, however, consider it necessary to clear up the question whether the Austrian courts, when assessing the question of the statute of limitations, ought to have considered themselves bound by the decisions of Dutch courts in parallel proceedings pending between the parties in the Netherlands with regard to the ownership and infringement of Benelux trademarks (where the Dutch courts had arrived at a different conclusion).

If will therefore be necessary here to examine and discuss the question of the binding effect, if any, of the decisions of Dutch courts in more detail.

Statements and arguments presented by the parties before the court of first instance with regard to the question of the binding effect of the decisions issued in the legal dispute between the parties before the Dutch courts:

On 17 July 2006 (reference no. (ON) six), the Claimant submitted the decision of *Rechtbank Rotterdam* (Appendix ,/QQQQ, in the Dutch language, accompanied by a German translation) as the court of first instance, dated 14 June 2006, stating that this was the first judgment of an EU member state court in the proceedings between the Parties which had dealt with the question of the (in)validity of the privatisation alleged by the Defendant (by the transformation of VVO Sojuzplodoimport into VAO Sojuzplodoimport). The Claimant stated that in this decision, *Rechtbank Rotterdam* had concluded that the Defendant was not the owner of the Benelux trademarks which had originally been the property of V/O or VVO Sojuzplodoimport because these trademarks had never passed into the ownership of VAO Sojuzplodoimport, but had remained the property of the former (VVO Sojuzplodoimport) (which had not ceased to exist) even after the VAO Sojuzplodoimport had been established and registered.

The Defendant replied (reference no. (*ON*) 63) that this decision of the Dutch courts was not a final judgment (in the first instance) regarding ownership of the disputed Benelux trademarks, but only an interim decision on partial aspects that had been passed without the assistance of an expert on Soviet-Russian law, and which could be contested without any risk of being hampered by the prohibition of introducing new evidence on appeal (*Neuerungsverbot*).

In its pleading of 31 July 2012 (reference no. (*ON*) 125), the Claimant stated that the *Gerechtshof 's-Gravenhage*, as the Court of Appeal, had, in the meantime, issued a binding decision (Appendix ./EEE.EE, in the Dutch language; Appendix ./EEE.EE1, German translation) which had become *res judicata* and according to which the Claimant had standing to sue, VVO Sojuzplodoimport had never been (effectively) privatised, the Defendant had not acted in good faith (when acquiring the disputed Benelux trademarks) and the Claimant's claims had not become statute barred. The Claimant went on to say that this judgment ought also, in accordance with Art. 33 para 1 of the Brussels I Regulation, to be recognised in Austria without there being any need for a special (recognition) procedure; this decision ought to be considered as having the same effect in Austria as in the Netherlands. According to Dutch law, there is no further possibility of drawing different conclusions concerning the aforementioned questions than those arrived at by the *Gerechtshof 's-Gravenhage;* this binding effect also applies to the proceedings in Austria. It would be "absurd" and irreconcilable with the contents of the Brussels I Regulation if (preliminary) questions were to be treated differently in different sets of proceedings pending within the EU.

The Defendant replied (reference no. (*ON*) 126) that the judgment of the *Gerechtshof 's-Gravenhage* was actually no more than another interim decision – only enforceable with regard to its decision as to costs – which had not provided any decision regarding ownership of the Benelux trademarks, and had, once again, been made without the assistance of a court-certified expert on Soviet-Russian law and, moreover, was still open to an appeal before the court of third instance. Another reason not to recognise the decision was that the Dutch proceedings concerned Benelux trademarks, which meant that the matter in dispute was not same as in the Austrian proceedings. Apart from that, there is no claim to recognition of decisions regarding mere preliminary questions. As in Austria, declaratory judgments concerning a preliminary question do not acquire an independent res judicata effect in the Netherlands, which also means that they can have no binding effect with regard to other lawsuits.

On 23 December 2013 (reference no. (ON) 149), the Claimant submitted the decision of the Supreme Court of the Netherlands, the *Hoge Raad der Nederlanden*, of 20 December 2013 (Appendix./FFF.FF, in the Dutch language; Appendix./FFF.FF1, German translation), claiming that this decision fully upheld the judgment of the *Gerechtshof 's-Gravenhage* of 24 July 2012. In the Claimant's opinion, this was incontestable proof – also binding the court in the Austrian proceedings – that it had standing to sue, that VVO Sojuzplodoimport had never been (effectively) privatised, that the Defendant had not acted in good faith (when acquiring the disputed Benelux trademarks) and that the Claimant's claims had not become statute-barred.

The Defendant replied (pages 2 to 4 of reference no. (*ON*) 154) that the Dutch decisions should not be recognised, since they referred to a different matter in dispute, specifically certain Benelux trademarks, and their legal basis was therefore completely different, consisting e.g. of the Benelux Trademark Act and the Civil Code of the Netherlands. The question of the statute of limitations had been examined there from the point of view of Dutch law and only as far as the question of the surrender and/or transfer of the Benelux trademark rights was concerned, while the preliminary question of the validity of the privatisation process, which would have had to be assessed in the light of the legal situation in Russia at the time, had been ignored. According to Austrian international private law, both the transformation under company law and the prescription of the right to invoke the invalidity or nullity of the transformation must be assessed on the basis of Russian substantive law. Furthermore, the Defendant pointed out, once again, that even if the Dutch decisions were to be recognised in principle, any decisions on preliminary questions contained therein could not possibly have a binding effect.

The legal opinion of the Supreme Court on the question of a binding effect of the decisions of the Dutch courts:

In its aforementioned decision of 11 August 2015 (reference no. (*ON*) 176) to remand the case to the Court of Appeal, the Supreme Court made the following points when discussing this issue:

> *"However, it is impossible, as yet, to come to a final conclusion as to whether the decisions of the Dutch courts in proceedings initiated by the Claimant against the Defendant with regard to the ownership and infringement of Benelux trademarks will, under the relevant provisions of Union law, be binding upon the Austrian courts with regard to the question of prescription to be decided in the present case.*
>
> *The ipso iure recognition of decisions passed in a member state, as ordered in Art 33 para 1 of the Brussels I Regulation – in the present case, since the proceedings were initiated before 10 January 2015, still in the version of Regulation (EC) No. 2001/44 (Article 66 of Regulation [EU] No. 1215/2012) – is based on the principle of extension of effects, that is to say, the judgment thus recognised will have the same effects in other countries as in its country of origin (Rs 145/86, Hoffmann/Krieg). This means that a judgment of a foreign court will have the same effects domestically as it has in its country of origin (3 Ob 212/06g etc.; RIS-Justiz RS0117940 [T1], RS0110172 [T4]). The objective and subjective limits of the res iudicata effect must therefore be assessed in accordance with the law of the country in which the decision was first passed (9 Ob 88/10x, with references to further literature).*
>
> *However, the principle of the extension of effects means that the objective limits of the res iudicata effect of the Dutch court decisions cited by the Claimant must be evaluated according to Dutch law. If Dutch law, as presented in the Claimant's arguments on appeal, recognises a res iudicata effect that also comprises preliminary questions dealt with in the court's decision, the conclusions of the Dutch courts concerning the question of transformation/universal succession between the legal predecessors of the parties to*

the dispute, including the evaluation of the pertinent question of prescription according to the Russian lex domicilii, might have a binding effect with regard to the dispute between the parties in the present case concerning the Austrian trademarks.

The Claimant is of the opinion that according to Dutch law, there is no longer any possibility of deciding the aforementioned questions in any other way. The Defendant, on the other hand, argues that Dutch procedural law knows no binding effect of decisions concerning preliminary questions passed in previous proceedings, particularly not in cases where the decision concerning the preliminary question was not relevant to the ultimate decision of the court (obiter dictum) or was not sufficiently substantiated, which is a general prerequisite for court decisions.

If the Claimant's description of the legal situation in the Netherlands is accurate, the Austrian courts would be bound by the decision concerning the question of universal succession, including the question of the – possibly statute-barred - right of enforcing claims based on possible defects. In such a case, the evaluation of the question of limitation by the court of appeal would be faulty and the court of appeal would be obliged to examine the further factual and legal arguments presented on appeal and, to that extent, continue the examination of the decision of the court of first instance in the light of the grounds for appeal as presented.

If, however, the Defendant's point of view – i. e., that the legal system of the Netherlands does not recognise any such extended res iudicata effect of preliminary questions answered during previous proceedings (either) - were found to be the correct one, the evaluation of the question of prescription by the court of appeal would not be contradictory even if the Dutch decisions in the proceedings concerning the Benelux trademarks were also taken into account.

Findings on the subject matter and course of the proceedings between the Parties before the Dutch court:

In the civil lawsuit filed with ***Rechtbank Rotterdam*** in the year 2003, the Claimant initially requested a declaratory decision to the effect that the Defendant was not the owner of the Benelux trademarks "Stolichnaya" and "Moskovskaya", as well as a court order prohibiting the Defendant from hindering and/or attempting to prevent the importation of products of the said brands by the Claimant and/or its customers/distributors into the Benelux states. It subsequently altered its claim by requesting that the Defendant be ordered (inter alia) to take all the measures required in connection with the registration of the said trademarks with the Benelux Trademark Office in the name of the Claimant – and, moreover, not only with regard to the two trademarks already mentioned above, but also with regard to numerous other Benelux trademarks, some of which also consist of, or include, the "Stolichnaya" and "Moskovskaya" marks – as well as to cease and desist, with immediate effect, from any further infringements of the Claimant's right to these trademarks. The Claimant justified these claims by alleging that it was the owner of the disputed trademarks, since the Defendant had never validly acquired them (Recitals 2.1 to 2.3 in Appendix./QQQQ).

The Defendant denied these claims and filed a counterclaim aimed (inter alia) at prohibiting the Claimant from using trademarks including the names "Stolichnaya" and "Moskovskaya" and from placing products branded with these names on the market in the Benelux states; the Defendant also requested the invalidation and/or cancellation of the Benelux trademarks including the aforementioned names that the Claimant had registered in 2003 and which had been entered in the Benelux Trademark Register on the Claimant's behalf. The Defendant's claims were based on its contention that it had validly acquired the Benelux trademarks registered on its behalf and that the Claimant was therefore infringing its trademark rights thus acquired (Recital 2.4 to 2.7 in Appendix ./QQQQ).

In its **(interim) decision in the first instance (*vonnis*) of 14 June 2006** (Appendix ./QQQ), *Rechtbank Rotterdam* first of all discussed the question of the Claimant's standing to sue (i.e., its "right to raise a claim"), which had been denied by the Defendant. The question whether the decision of the government of the Russian Federation 6 January 2005 cited by the Claimant (the "Decree") was a sufficient basis to create a standing to sue was left open. The court stated that, in order to answer this question, an examination of the legal nature of this decision and statements from the parties would still be required. For the time being, the court would "assume, as a prerequisite, that the FKP was entitled to sue", although this does not constitute a decision with regard to the question whether the trademarks (this is obviously a reference to the Benelux trademarks originally registered on behalf of VO/VVO Sojuzplodoimport) belong to FGUP Sojuzplodoimport or to the Russian state (Recital 3.7 to 3.10 in Appendix ./QQQQ).

Rechtbank Rotterdam then went on to discuss the question whether VAO Sojuzplodoimport was the universal successor (and, consequently, also the legitimate recipient of the transfer of trademark rights) of VVO Sojuzplodoimport. The court gave it as its opinion that this question would have to be assessed based on Russian law, without, however, stating whether the applicable law was the law of the Soviet Union or that of the Russian Federation. The Russian court decisions submitted by the Claimant in connection with this point were said to be irrelevant due to their lack of binding effect (Recital 3.12 to 3.19 in Appendix ./QQQQ), an independent examination (based on the relevant statements and arguments, as well as on the evidence submitted to substantiate them) appearing to show that none of the "transformation or privatisation procedures" – whether based on the AGGmbH-O UdSSR, on the Privatisation Act of the RSFSR of 3 July 1991 or on any other legal ground – cited as decisive by each of the parties had been (fully) completed. Consequently, it cannot be said that there is sufficient evidence of a universal succession (including a transfer of trademark rights as part of the same) (Recital 3.22 3.42 in Appendix ./QQQQ).

As the next step, *Rechtbank Rotterdam* examined the question whether the Defendant had acted" in good faith" when acquiring the disputed (Benelux) trademarks (with the acquisition being governed by Dutch law) from ZAO Sojuzplodimport (by a contract dated 12 April 1999) as regards the latter's right of disposal. The court found that this had not been the case because the co-founder and majority shareholder of the Defendant, Y. V. Shefler, could - and ought to - have known, in view of his activities as a member of the management board of VZAO Sojuzplodoimport, that VAO Sojuzplodoimport was not the legal successor of VVO Sojuzplodoimport; at the very least, he ought to have doubted that

any such legal succession had taken place. The court found, moreover, that the extremely low purchase price of US$ 800,000, which was far below the market value, also indicated a lack of good faith. Consequently, since the Defendant had not acted in good faith, it is neither entitled to claim third party protection nor to rely on the presumption that the possessor is also the owner (Recital 3.43 to 3.52 in Appendix ./QQQQ).

From all this, *Rechtbank Rotterdam* concluded that the Defendant was not the owner of the trademarks originally registered on behalf of VO/VVO Sojuzplodoimport, and that said trademarks had remained the property of VVO Sojuzplodoimport (which had continued to exist) after the establishment of VVO Sojuzplodoimport, and had passed from VVO Sojuzplodoimport to FGUP VO Sojuzplodoimport (in 2001). The court pointed out that the Claimant had stated that FGUP VO Sojuzplodoimport had transferred the trademark rights in its possession to the Russian state, and that this statement had not been contested. Since, on the one hand, the Claimant had claimed to possess the disputed trademark rights and, on the other hand, had also alleged that the Russian state had charged it with surrendering [this is probably intended to mean "reclaiming"] and registering these trademark rights, it would still have to clarify its position (Recital 3.53 23.56 in Appendix ./QQQQ).

The decision of *Rechtbank Rotterdam* ultimately provided that a) the case should be "referred to the hearing on 12 July 2006", to give the Claimant a chance to present its arguments on the question of its standing to sue (enforcement of its own rights or acting in the name of third-party, particularly in the name of the Russian state) and the Defendant in the counterclaim proceedings to present its argument on the acquisition and use of the four trademarks relevant to the said proceedings, b) any further decisions in the claim and counterclaim proceedings should be suspended and c) leave should be granted to appeal against its judgment before the passing of the final decision (Recital 4 in Appendix./QQQQ).

The Defendant filed an appeal against the cited decision of *Rechtbank Rotterdam* of 14 June 2006 (see Appendix ./151, in the Dutch language with German translation); the Claimant replied by submitting a (partially conditional) "interim appeal". In the subsequent **decision (*arrest*)** of the court of second instance of **24 July 2012** (Appendix/EEE.EE and/or ./EEE.EE1), the ***Gerechtshof 's-Gravenhage*** initially came to the final conclusion, based on an examination on the merits, that the Claimant had standing to sue – unlike *Rechtbank Rotterdam,* which had only assumed this on a temporary basis. It therefore set aside the judgment of the court of first instance only to the extent of scheduling a new hearing to provide the Claimants with an opportunity of clarifying the question of its standing to sue (Recital 7.72 7.19, lit 21.2, and page 3 Appendix ./EEE.EE1).

The next step involved the *Gerechtshof 's-Gravenhage* examining the question of the law according to which the "property law aspects" of the disputed Benelux trademark rights (e.g. the question whether they had been validly transferred, or the question of third-party protection) should be assessed, and concluding that the law in question was Dutch law (Recital 8.12 8.20 Appendix ./EEE.EE1)

In its appeal, the Defendant had raised the objection (not yet discussed before the court of first instance and, consequently, not dealt with by *Rechtbank Rotterdam*, either) that the validity of the privatisation of VVO Sojuzplodoimport was no longer a subject for discussion because

any claims based on the possible invalidity of the privatisation had already become statute barred under Russian law. This argument was considered unsound by the *Gerechtshof 's-Gravenhage,* which found that the Claimant was demanding the surrender and/or transfer of the disputed Benelux trademarks based on a more potent claim, and that this claim referred to a "property law aspect" governed by Dutch law. According to Dutch international private law, the same applied to the question whether the claim had become statute barred; this meant that, contrary to the Defendant's opinion, this question would also have to be assessed in the light of Dutch law, rather than Russian law. According to Dutch law, such a claim only becomes statute barred after 20 years; this period had not yet expired and the claim was therefore still valid (Recital 9.1 to 9.7 in Appendix./EEE.EE1). Finally, the *Gerechtshof 's-Gravenhage* stated as follows concerning this point (Recital 9.8 in Appendix ./EEE.EE1:

> *"For the sake of completeness the Court of Appeal notes that (a) in these proceedings FKP* [i.e., the Claimant] *did not file a claim seeking the cancellation of the transformation, and (b) that the mere argument that the transformation/ privatisation is non-existent or invalid is not subject to prescription, this applies both under Dutch and under Russian law."*

The *Gerechtshof 's-Gravenhage* then went on to discuss the question of the distribution of the burden of proof (from the point of view of Dutch law) and resolved the issue by finding that the Defendant, as the registered trademark holder, was entitled to benefit from the presumption that it was also the owner of the trademarks. It stated that it was a matter for the Claimant to refute this presumption by proving that it had a better right to the trademarks and, consequently, that no valid transformation (privatisation) of VVO Sojuzplodoimport had taken place. Regarding the question whether the Defendant had acted in good faith in acquiring the trademark rights (from ZAO Sojuzplodoimport), it was the Claimant which was obliged, as a matter of principle, to allege and prove facts showing that the Defendant had not acted in good faith; the Defendant, in turn, was obliged to present facts and circumstances to show that it had acted reasonably in believing the seller of the trademarks to have been authorised to dispose of them, and that it had properly performed its duties of care and verification in this respect (Recital 10.3 to 10.9 in Appendix ./EEE.EE1).

In the paragraphs following this, the *Gerechtshof 's-Gravenhage* entered into a detailed discussion of the question whether VVO Sojuzplodoimport had been validly privatised and whether its trademark rights had been validly transferred to VAO Sojuzplodoimport. According to the court, this question must be assessed in accordance with the law applicable in Russia at the time. The court goes on to state that irrespective of whether the law of the USSR or that of the RSFSR is considered decisive, the results would always be the same, i.e., that no legally valid transformation/privatisation and, consequently, no universal succession (triggered by such a transaction) had ever taken place. In view of the lack of allegations or findings of any other form of a transfer of trademarks from VVO Sojuzplodoimport to VAO Sojuzplodoimport, it should therefore be assumed that the disputed trademark rights had remained the property of VVO Sojuzplodoimport even after and/or irrespective of the establishment of VAO Sojuzplodoimport (Recital 11 to 16.3 in Appendix ./EEE.EE1).

In the step that followed, the *Gerechtshof 's-Gravenhage* also confirmed the opinion of *Rechtbank Rotterdam*, according to which the Defendant had not acquired the disputed trademark rights in good faith (Recital 17.1 to 17.11 in Appendix ./EEE.EE1).

The result was that the *Gerechtshof 's-Gravenhage* confirmed the decision of the court of first instance – with the exception of the aforementioned partial setting aside regarding the examination of the Claimant standing to sue, which was no longer considered necessary – and referred the case to *Rechtbank Rotterdam* for a decision on the principal claim (Recital 21.2 and page 33 in Appendix ./EEE.EE1).

The appeal (Revision) against this decision filed by the Defendant was dismissed by a **judgment** (***arrest***) of the ***Hoge Raad der Nederlanden* of 20 December 2013** (Appendix ./FFF.FF and/or FFF.FF1). The Supreme Court concurred (without giving any particularly profound reasons for doing so) in the conclusions of the lower court as far as the assessment of the Claimant's standing to sue and the assumption that the Defendant had not acted in good faith when acquiring the trademarks were concerned (Recital 3.6.3 and 3.8 in Appendix./FFF.FF1). Regarding the subject of the statute of limitations, the court stated as follows (Recital 3.7.5 in Appendix./FFF.FF1):

> *"In parts . . .* [of the appeal] *the complaint further derives that the court of appeal* [i.e., the *Gerechtshof 's-Gravenhage*] *in (particularly) par. 9.8 failed to recognize that under Russian law the power to rely on the invalidity of the transformation is prescribed. This necessarily implies that the claim of FKP should be rejected. This complaint fails. Par. 9.8 of the court should be read in conjunction with paras. 16.1-16-3. In the latter considerations, which are not contested in appeal as such – the court has not ruled on a reliance on invalidity of the transformation under Russian law which in absence of such a reliance should have been valid, but the court ruled that the VO trade mark rights* [abbreviated designation for the disputed Benelux trademarks formally registered in the name of VO Sojuzplodoimport] *at that time have not been transferred to VAO by universal succession, because according to Russian law there was no transformation of VVO in ZAO* [is likely that this is actually intended to read VAO] *(so VVO continued existence). It follows from these considerations that VVO remained entitled to the VO trademark rights.*
>
> *Furthermore, the court held in par. 16.3, not disputed in cassation, it is not alleged or shown that otherwise (the court of appeal meant: other than by a legal privatization) there has been a legal succession of WO by VAO whereby the VO-trademarks have been transferred under universal title or that there has been a transfer of those rights by W O to VAO. In this recital it is decided that it is not alleged or proven that the prescription of the ability to rely on the invalidity of transformation under Russian law, has led to an acquisition of the VO trademarks by VAO. The judgment of the court of appeal that (the prescription under Russian law of) the ability to rely on the invalidity of transformation is independent of (the prescription under Dutch law of) the underlying claim to transfer the trademark registration does not show an incorrect interpretation of the law. A more detailed statement of reasons is not required, either."*

When proceedings were continued, ***Rechtbank Rotterdam***, in its **judgment (*vonnis*) of 25 March 2015** (Appendix/AAA.AAA, in the Dutch language; Appendix./AAA.AAA1, German translation), again found for the Claimant. The court first dealt with the alterations to the claim and counterclaim that had been made in the meantime and found them to be admissible. The claim is now, inter alia, aimed at obtaining a court order instructing the Defendant to take all the measures necessary for a re-registration of the Benelux trademarks "Stolichnaya" and "Moskovskaya" in the name of the Claimant, and at having the invalidity of numerous trademark registrations in the name of the Defendant (regarding "Stolichnaya" and "Moskovskaya") confirmed and their deletion ordered. On the other hand, the Defendant, in its counterclaim, requests, inter alia, that the Claimant be prohibited from infringing the Benelux trademarks registered in the name of the Defendant and that the trademark registrations obtained by the Claimant in 2003, which made use of the "Stolichnaya" and "Moskovskaya" names, be declared invalid (Recital 2 in Appendix ./AAA.AAA1).

Subsequently, *Rechtbank Rotterdam* entered into an exhaustive discussion of the question whether or not it ought to consider itself bound by the "(final) decisions" hitherto passed in these proceedings and confirmed by the higher courts, or whether – as the Defendant had claimed by reference to the "extended doctrine of binding final decisions" – it was entitled to deviate from the said final decisions. It concluded that there was no reason for such deviation, since the aforementioned doctrine was not applicable in the present case. It therefore decided to base its decision (inter alia) on the following starting points: 1) that no valid transformation or privatisation of VVO Sojuzplodoimport had ever taken place and that the "VO trademark rights" had never passed to VAO Sojuzplodoimport (or, consequently, to the Defendant) by way of universal succession, 2) that the Claimant had standing to sue, 3) that the Defendant had not acted in good faith with regard to the right of disposal of ZAO Sojuzplodoimport when acquiring the trademark rights, and had filed the application (for the Benelux trademarks) in bad faith, and 4) that the claim had not become statute-barred (Recital 3.1 to 3.11 in Appendix./AAA.AAA1).

Starting from these assumptions, *Rechtbank Rotterdam* examined the individual points of the claim and counterclaim, allowed the claim for the most part and dismissed the counterclaim, since it had come to the conclusion that the Benelux trademarks "Stolichnaya" and "Moskovskaya" were the property of the Claimant rather than that of the Defendant.

Against this decision of 25 March 2015, the Defendant filed a comprehensive **appeal** (Appendix ./FFF.FFF, in the Dutch language; Appendix ./214, in Dutch with extracts translated into German), in which it contested, inter alia, the view of *Rechtbank Rotterdam* according to which the latter considered itself bound to the starting points listed in the penultimate paragraph, on which it had based its decision. In reply, the Claimant filed an answer to the appeal (Appendix ./GGG.GGG, in the Dutch language).

The Defendant subsequently (apparently in the summer of 2016) filed a "**reply to the appeal**" (*Berufungserwiderung*) (Appendix ./223, Dutch extract with German translation; concerning this point, see also Appendix ./224) in which it adopted the view that the "doctrine of binding final decisions" should be considered all the more applicable in these proceedings because the decisions hitherto passed had all been based on a (procedural)

fraud perpetrated by the Claimant. This accusation was justified by references to an alleged gross misrepresentation of the facts by the Claimant, as well as by the allegation that a large number of documents relevant to the proceedings had been seized during raids (carried out by the Russian authorities) in the years 1999 to 2002 and had never been returned, so that ZAO Sojuzplodoimport, and, consequently, also the Defendant had been rendered "powerless" (as far as evidence was concerned).

By **the judgment *(arrest)* of the *Gerechtshof Den Haag* of 9 January 2018** (Appendix ./VVV.VVV, in the Dutch language; Appendix ./VVV.VVV1, German translation), the decision of the *Rechtbank Rotterdam* was reversed, modified or supplemented in several individual points – all of which are irrelevant the present case –, but was confirmed in all its main points. Of this decision, the *Gerechtshof 's-Gravenhage* agreed, among other things, with the legal opinion of the court of first instance regarding the binding effect of the "binding definitive decisions" issued during the first set of proceedings, and/or the inadmissibility of reviewing the merits of the disputed items covered by them (Recital 17 to 25 in Appendix ./VVV.VVV1). In this connection, it also dismissed the argument of procedural fraud committed by the Claimant ("misrepresentation"; Recital 26 to 45 in Appendix ./VVV.VVV1).

The considerations of the Court of Appeal that were relevant to the decision:

The Court of Appeal focused its considerations on the question whether or not there is a binding effect of the Dutch decisions regarding the preliminary question (which had been answered in the affirmative, with the approval of the Supreme Court, in the Austrian decision on appeal of 10 December 2014, which was subsequently set aside) as to whether the right of enforcing a possible invalidity of the transformation (privatisation) of VVO Sojuzplodoimport (thereby creating the basis for the disputed Austrian trademark rights to remain the property of VVO Sojuzplodoimport) had already expired (according to the applicable Russian substantive law) before the claim was filed. If such a binding effect (which would necessarily demand a different assessment of the issue of prescription) is denied, the question whether the court should consider itself bound by the way the Dutch courts had treated other preliminary questions (effectiveness of privatisation, the Claimant's standing to sue, whether the Defendant had acquired the trademarks in good faith) would no longer arise.

According to Article 236 para 1 of the Netherlands Code of Civil Procedure, decisions that are related to the legal relationship in the dispute and have been delivered in a final judgment will have a binding effect in other lawsuits between the same parties. The elements of this provision have, in any case, been realised to the extent that the Austrian proceedings may be regarded as "another lawsuit between the same parties" as far as the Dutch proceedings are concerned.

As regards the element of the "decision in a final and absolute judgment", Dutch law provides that a decision must have become res judicata formally - that is to say, the judgment must no longer be contestable by ordinary legal means - in order to be considered res judicata from the point of view of substantive law (margin no. 23 in reference no. (*ON*)

256). The present case is characterised by the fact that in the Dutch case, no formally final judgment (i.e., one which can no longer be contested) has been issued as yet; there is "only" an interim judgment (as defined by Dutch – not by Austrian – civil procedure law) that has been confirmed by both appellate courts, followed by a first-instance final judgment, which has now essentially been confirmed by the court of second instance. This raises the question of whether decisions (concerning preliminary questions) contained in the interim judgment (confirmed by the appellate courts) can already have become final and absolute under substantive law and thus have a binding effect with regard to different proceedings between the same parties.

The legal expert appointed by the Court of Appeal, Prof. Dr. Jan Vranken, reached the preliminary conclusion, based on an analysis of the case law of the Supreme Court of the Netherlands (in particular the judgment of 17 December 2010 in the *Lammers/Verhoeven* case), that (preliminary) decisions in an interim ruling can only become substantial res judicata (and thus have a binding effect) if a final judgment or partial (final) judgment issued after the interim judgment has become formal res judicata (margin no. 33-40 in reference no. (*ON*) 256). In addition – and, once again, based on the recent case law of the Supreme Court (*Fafianie/KSN* of 30 March 2012 and *Ebecek/Trudo* of 26 February 2016) - he "refined" this principle even further by postulating that it was not necessary for the formal res judicata effect (which triggers the binding effect) to extend to the entire final or partial (final) judgment, but rather that individual decisions (on preliminary questions) contained in such a judgment could also formally become final and absolute as a result of the parties waiving their right to appeal against them (as opposed to other decisions [on preliminary questions] in respect of which appeals have been raised) (margin no. 42-45 in reference no. (*ON*) 256). According to Prof. Vranken, this nuanced approach to the problem is "valid Dutch law" (margin no. 52 in reference no. (*ON*) 256). According to this, in the present case, the binding effect of decisions (on preliminary questions) included in the Dutch interim judgment depends on whether, or to what extent, they are or may still become the matter in dispute in appeal proceedings against the final decision of the court of first instance. The legal expert (albeit without detailed knowledge of the content and course of the appeal proceedings, in which no decision had yet been passed at the time) considered that the latter option was highly unlikely, if not completely impossible in respect of the relevant preliminary questions (effectiveness of the privatisation, prescription of rights to challenge the transaction based on its invalidity, the Claimant's standing to sue, the Claimant's good faith when acquiring the trademarks) (margin no. 61 in reference no. (*ON*) 256).

The legal concept described, as to its main features, in the preceding paragraph was succinctly summarised and maintained by Prof. Dr. Jan Vranken in his supplementary expert opinion (reference no. (ON) 333) (in which he answered long lists of questions submitted by the parties) ("second to fourth rule"). He also (as already in his first expert opinion: margin no. 62-65 in reference no. (*ON*) 256) provided detailed and cogent explanations as to why he did not share the views of the private experts hired by the parties, Prof. Dr. Toon van Mierlo (Claimant) and Prof. Dr. Constant van Nispen (Defendant). In response to a demand from the Court of Appeal, he confirmed, in his opinion of 18 September 2017 (reference no. (*ON*) 371), that the interim judgment upheld by both appellate courts has no binding effect if the

subsequent final judgment of *Rechtbank Rotterdam* as the court of first instance of 25 March 2015 is left out of account. He upheld this opinion also in view of additional questions and allegations of the Claimant, which tried to deduce from the decisions of the *Hoge Raad,* particularly that in the case of *De Kraa/Van der Bruggen* and the *Rechtbank* Den Haag of 17 May 2017 in further proceedings in the Netherlands between the parties to this dispute, that the interim judgment (confirmed by the appellate courts) is formal res judicata – and, therefore, has a binding effect – even without a subsequent final or partial (final) judgment (reference no. (*ON*) 406).

The Court of Appeal, at any rate, does not consider it necessary, at this point, either to obtain any further information from the expert – including, but not limited to, a verbal discussion of the expert opinion – or to make any further additions to the result of the proceedings. What is required here is not a "normal" procedure of taking evidence with regard to facts relevant to the decision, but the collection of information on foreign law. According to sec. 4 para 1 of the Austrian Act on International Law (*Gesetz über das Internationale Privatrecht, IPRG*), this must be done *ex officio*; ways of doing this include the participation of the parties, obtaining information from the Federal Ministry of Justice and expert opinions. The court must decide, at its own discretion, how it wishes to procure the necessary information on foreign law. It is not obliged to undertake any particular investigative activities, which is why e.g. a failure to request assistance from the parties or a refusal to obtain a legal opinion do not constitute a procedural error. The court does not have to accept investigative tools offered by the parties, it is not bound by any information or private expert opinions obtained by the parties, and it is not obliged to disclose the sources of knowledge from which it determines the foreign law before its application for the purpose of permitting the parties to comment on them (RIS Justiz RS0045163 [T4, T11]; *Verschraegen in Rummel*, Kommentar zum ABGB3 II / 6 [2004], § 4 IPRG, margin no. 1 f; *id.*, Internationales Privaterecht [2012], margin no. 1093). In the present case, the parties to the dispute were, in any case, deeply involved in the investigation process, a situation which must eventually come to an end in order to permit a conclusion of the proceedings and a decision to be reached. On complex legal issues regarding which foreign legal scholars hold diverging views, it will not be possible to reach an "agreement" on a result that will be accepted on all sides, no matter how much additional information is obtained and/or how many discussions are held. The Court of Appeal has decided to adhere to the assessment of the expert witness appointed by it, which it considers convincing, particularly in view of the fact that this expert – unlike the private experts who may possibly, albeit within the limits of what is scientifically acceptable, have let themselves be guided more or less by the interests of their respective clients - is not beholden in any way to either of the parties to this dispute.

Assuming that the Dutch interim judgment will have a binding effect only after the passing of a subsequent final or partial (final) judgment which can no longer be contested, at least with regard to the relevant (preliminary) decisions, the first question arising in the present legal dispute will be that of determining the (interim) status of the proceedings of the Dutch lawsuit that must be assumed as a basis for its assessment. The possible range here comprises the entire spectrum from the status of the proceedings at the time of the end of the hearing before the Austrian court of first instance (10 April 2014, i. e., before the final decision in the first instance of *Rechtbank Rotterdam* of 25 March 2015), up to the

current stage of the proceedings (i.e., with due consideration of the aforementioned final decision and the decision on appeal passed in the meantime).

In civil law appeal proceedings, with the exception of cases where licence to introduce new evidence on appeal has been granted (which is not the case here), it will only be necessary to examine whether the claim was justified at the time of the conclusion of the hearing before the court of first instance. This means that alterations of the facts after that point in time must not be taken into account in the decision on appeal (RIS-Justiz RS0041770 [T41]; most recently: Austrian Supreme Court (*OGH*) 16.12.2015, 7 Ob 139 / 15i). This principle must also apply with regard to the question whether there is or was a binding effect based on another, legally valid decision, or whether such a binding effect has been ignored. After all, such a binding effect can only have been violated or ignored if it already existed at the time the judgment in question was passed, that is, at a time when the substantive final and binding decision was already in place (RIS Justice RS0112164). The question whether a specific other decision had already been passed before the end of the hearing or at least before the subsequent date of issue of the judgment is a question of fact and therefore part of the facts to be judicially assessed. Subsequent changes to this factual situation occurring during the appeal proceedings cannot be relevant to the outcome of the review of the judgment passed by the court of first instance. This point of view is confirmed by the relevant case law, according to which the ground for the resumption of proceedings of sec. 530 para 1 lit. 6 of the Austrian Code of Civil Procedure (*Zivilprozessordnung, ZPO*) aimed at the protection of the res judicata effect (and, consequently, also of the binding effect as one of its manifestations) requires that the decision formerly passed with regard to the same claim or the same legal relationship (in preliminary or parallel proceedings) that the party subsequently discovers or becomes entitled to make use of, must have become res judicata before the conclusion of the hearing before the court of the first instance, or at least before the judgment has been passed (in the proceedings to be resumed) (RIS-Justiz RS0043711 [T2, T3]; see also RS0044488).

It is true that the prohibition on introducing new evidence on appeal of sec. 482 of the Austrian Code of Civil Procedure does not apply in the case of procedural defences (*Prozesseinreden*) which must, in any case, be taken into account ex officio even by the court of second instance (RIS-Justiz RS0039968 [T4]. However, as the reference to procedural defences (that is to say, the enforcement of the consequences of impediments to a legal action) shows, this legal principle only applies to the "ne bis in idem" effect of res judicata, but not to its binding effect, which does not hinder a decision on the merits, but merely creates an obligation to adopt the findings of fact and/or legal conclusions of the binding (prior) decision and to base the (new) decision now to be made on them.

The fact that the substantive res judicata effect, to the extent it manifests as a binding effect, must be taken into account ex officio (RIS Justice RS0074226) does not, in itself, provide any indication as to when it must have occurred in order to be taken into account. Apparently, the decisions underlying this legal principle – to the extent that they affirmed the binding effect – all concerned factual situations in which that binding effect had occurred before or during the proceedings before the court of first instance.

According to the relevant established case law, a disregard for the binding effect of a criminal conviction that has become substantial res judicata should be assigned the same weight as that accorded to a ground of invalidity to be taken into account ex officio (RIS-Justiz RS0074230). With regard to this binding effect, it is irrelevant whether the conviction had already become final and absolute at the time of the filing of the complaint or whether it only did so at the end of the hearing before the court of first instance (RIS-Justiz RS0074219 [T2]). In its findings of 8 May 2013 in the case of 6 Ob 21 / 13a, the Supreme Court took the view, apparently for the first time, that it ought also to take into account the binding effect of a criminal conviction only handed down after the conclusion of the trial before the court of first instance, but still before the decision of the second instance (RIS-Justice RS0074230 [T1], RS0074219 [T31]), albeit with the restrictive annotation of "at least in the procedural constellation in the present case", and without any discussion of the aspects set out in the last three paragraphs. The decision of 7 Ob 8 / 15z of 18 February 2015, which reiterates and/or refers to this conclusion, was not actually concerned with the binding effect, but rather with the principle of *ne bis in idem* which had taken effect in the case in question after the conclusion of the hearing before the court of first instance but before the decision by the court of first instance. Finally, the decision of 16 December 2015 in the case 2 Ob 203 / 15i, which affirmed the binding effect of a court order (*Beschluss*) prejudicial to the decision on appeal that had only been issued and become res judicata in the course of the appeal proceedings (RIS Justice RS0074230 [T2]) does not provide a closer explanation, either.

The Court of Appeal considers the end of the hearing before the court of first instance as a decisive turning point (for a concurring opinion, see also *Frauenberger-Pfeiler/Rechberger* in Appendices ./234 and ./236; dissenting: *Oberhammer* in Appendix ./UUU.UUU). The affirmation of a binding effect of judgments handed down in other proceedings that have been issued at a later date, i.e. during the appeal proceedings, would have the unsatisfactory result that decisions made by the court of first and/or second instance that are not objectionable as to content and have been handed down without any breach of a binding effect would have to be modified and/or set aside only because, following their adoption, a binding effect has been created by a decision that has been passed, or has become res judicata, in the meantime in different proceedings and that, if it were taken into account, would lead to a different outcome of the proceedings. If this were to be accepted, the outcome of court proceedings would therefore depend on the chronological sequence of the decisions being made in the two lawsuits, or, in other words, on how fast or slowly the appeals proceed on both sides, which would be a more or less random (and thus ultimately an unconvincing) criterion. Moreover, in Austrian civil procedure law, the appellate proceedings are intended as an examination of the question whether the claim was justified on the date of the end of the hearing before the court of first instance (or, at least, on the date of the decision of the court of first instance) and, therefore, of the question whether the decision of the court of first instance was or was not correct; such a view would deprive the appellate proceedings of this inherent character, instead making the decision dependent on (more or less uninfluenceable) circumstances that have only arisen during the appeal proceedings.

In the present case, the hearing before the court of first instance was closed on 10 April 2014 (reference no. (*ON*) 156) and the judgment of the court of first instance, in which the court found for the Claimant, was handed down on 12 August 2014 (reference no. (*ON*) 168). The Defendant appealed against this judgment and on 10 December 2014, the Court of Appeal passed a decision altering the decision of the court of first instance so as to dismiss the claim, with the argument that the claim for damages had become statute-barred (under Russian law) (reference no. (*ON*) 172). In its finding of 11 August 2015, the Supreme Court, which had been appealed to by the Claimant, came to the conclusion that the assessment of the court of appeal regarding the question related to the statute of limitations was unexceptionable; all the same, it set aside the judgment on appeal on the ground that it would still be necessary to examine whether – as alleged by the Claimant before the court of first instance – the Austrian courts were bound, under Article 33 para 1 of the Brussels I Regulation, by a different conclusion regarding the question of the statute of limitations in the decisions of the Dutch courts (reference no. (*ON*) 176). This examination has led to the conclusion that the judgment on appeal of 10 December 2014 (reference no. (*ON*) 172) was made without any violation of a binding effect, since at that time (and all the more so, of course, at the time of the conclusion of the hearing before the court of first instance), the final decision of *Rechtbank Rotterdam* of 25 March 2015 (which constitutes a prerequisite for any binding effect of the interim judgments) had not yet been passed. If this judgment were to be taken into account, this would lead to the strange result that a decision on appeal that is both materially correct and formally free from defects (reference no. (*ON*) 172) would have to be "set aside" later just because a decision subsequently (at the stage of an appeal on a point of law) passed in different proceedings may have suddenly have acquired a binding effect.

Apart from this formal problem, the Court of Appeal does not appear to have at its disposal any decision of the Dutch courts that could be considered eligible for recognition and therefore suitable for creating a binding effect as regards the question of the statute of limitations examined and assessed in the Austrian proceedings. The (interim) judgment of *Rechtbank Rotterdam* as the court of first instance of 14 June 2006 did not address this issue at all (since no objection had been raised on this point). In its judgment of 24 July 2012, the *Gerechtshof 's-Gravenhage* came to the conclusion that the Claimant's claim, based on the allegation of a more potent claim, for the surrender and/or transfer of the Benelux trademarks which were the subject matter of the proceedings in question was to be assessed in accordance with Dutch property law, including the question of the statute of limitations regarding this claim, which resulted in the application of a 20-year limitation period in accordance with Dutch law. Apart from that, the court only offered a succinct statement to the effect that the Claimant had "*failed to bring a claim for a declaration of invalidity of the transformation*" and that "*the mere statement that the transformation/ privatisation had never taken place or had been invalid is not subject to the statute of limitations*", and that this applied both under Dutch and under Russian law. In its judgment of 20 December 2013, the *Hoge Raad* shared this opinion, and emphasised the aspect that the invalidity of privatisation under Soviet and/or Russian law (which had been affirmed in the Dutch proceedings in view of the absence of universal succession and of any other legal

title) means that no transfer of the Benelux trademark rights from VVO Sojuzplodoimport to VAO Sojuzplodoimport had ever taken place.

In view of the sweeping generalisation and the lack of discrimination underlying this finding of the Dutch courts, the Court of Appeal finds itself unable to concur in their conclusion – i.e., that the fact of an invalidity or nullity of the privatisation is not, *per se*, subject to the statute of limitations under any legal system and will therefore, as it were, "forever" hinder the affirmation of a transfer of trademarks (effected as a result of privatisation). On the one hand, this view ignores the fact that the privatisation of VVO Sojuzplodoimport, planned and carried out in 1990/91, had for many years been considered valid by all those involved, including the Russian state, and had been fully implemented and "lived". VAO Sojuzplodoimport took over the assets (particularly trademarks) of VVO Sojuzplodoimport, disposed of them and operated them as an owner, without anyone - including, without limitation, the Russian state as the former beneficial owner of these assets - objecting to it or questioning the legal validity of the transfer of assets. It was only after the political upheaval of 1999/2000 that this view started to change, with the state making efforts to "reintegrate" privatised former state property, which, in this specific case, were justified by the argument that the privatisation process had not met all legal requirements and had therefore remained without legal effect.

On the other hand, the considerations of the two Dutch courts of appeal also lack any actual substantive examination of the Russian statute of limitations, which – as expressly confirmed by the Supreme Court in its decision to set aside of 11 August 2015 (reference no. (*ON*) 176) – is the only statute relevant in the present case. As has been established in the Austrian proceedings by numerous and detailed legal opinions, not only actions for a declaratory judgement regarding the invalidity of a legal transaction (including privatisation transactions), but also actions for the application of the consequences of such invalidity – as need to be assessed in the present case – are subject to the ten-year limitation period of Art. 181 para 1 of the Civil Code of the Russian Federation (CC RF), which came into force in 1995. This statute of limitations begins to run upon the completion of the (allegedly ineffective or invalid) legal transaction and, in this case, expired - at least as far as the Austrian trademarks are concerned - even before the action was brought. After the expiry of the deadline, a legal fiction of effectiveness of the legal transaction will take effect as far as the debtor attempts to rely on the statute of limitations, and it will therefore no longer be possible to enforce the legal consequences of possible defects of the legal transaction (in this case the privatisation process) (for more details, see the remarks on pages 14 et seq. of the judgment on appeal of 10 December 2014, reference no. (*ON*) 172). This fiction of effectiveness means that the invalidity or nullity of a transaction (privatisation process) cannot – as appears to be indicated by the view espoused by the Dutch courts of appeal – be enforced without any limitation as to time based on the argument of a lack of valid title for the transfer of the property, but, in the interests of legal certainty and law and order, only within ten years from the date of completion of the ineffective and/or invalid transaction. After the expiry of this period, the transaction will be considered effective and will therefore constitute a valid legal title for its fulfillment or implementation.

The considerations of the *Hoge Raad* (in Recital 3.7.5 in Appendix ./FFF.FF1) do not indicate that the court had actually dealt with the substantive question whether the legal possibility to invoke the ineffectiveness of a privatisation procedure had become statute-barred under Russian law. Rather, it took the view that, assuming the privatisation procedure to have been ineffective, there was no title for the acquisition of trademarks by the Defendant, irrespective of whether or not the invalidity of the privatisation procedure could still be contested under the Russian statute of limitations. Based on this assumption, the expert witness, Prof. Dr. Jan Vranken, also concluded that the *Hoge Raad* had not ruled on the question whether or not the right to invoke the invalidity of the privatisation process had become statute-barred under Russian law, but had limited itself to the legal conclusion that the claim to the surrender of the (Benelux) trademark rights (which had not yet become statute-barred under Dutch law) should be allowed according to Dutch law even if the right to invoke the invalidity of the privatisation procedure had already become statute-barred under Russian law (margin no. 61 in reference no. (*ON*) 333).

In view of the above facts and arguments, the court has passed the decision set forth in the operative provisions above and has ordered the judgment of the court of first instance to be altered, once again, so as to dismiss the complaint due to the expiry of the statute of limitations. As regards the expediency of reserving the decision as to costs (*Kostenvorbehalt*) pursuant to sec. 52 para, 1 and 2 of the Austrian Code of Civil Procedure, there has been no alteration of the basis of assessment; the same applies with regard to the evaluation of the subject matter in this case. An ordinary appeal on points of law (*ordentliche Revision*) has been admitted as there is an obvious lack of Supreme Court case law on the civil procedure-related question whether the binding effect of a decision being passed in proceedings in a different case and only arising at the stage of an appeal on a point of law in third instance should still be taken into account.

Higher Regional Court of Linz, div. 2
Linz, 5 February 2018
Dr. Paul Aman, judge

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