



FIRST HALL OF THE CIVIL COURT

HON. JUDGE MARK SIMIANA, LL.D

*In the acts of the application for the issue of the warrant of prohibitory injunction
numbered 532/2024/1 MS in the names:*

**Mikhail Mokhovikov in his capacity of special mandatory in the name and on behalf of
SBK ART LLC, a company registered in the Russian Federation**

Vs.

- 1. Open Pass Limited**
- 2. Fortenova Group STAK Stichting**
- 3. Fortenova Group TopCo B.V.**
- 4. Iter Stak Stichting**
- 5. Iter BidCo B.V.**
- 6. Pavao Vujnovac**

1. This is a final decree regarding a request made by the petitioner nomine by virtue of an application filed on the 26th March, 2024. Petitioner has requested this court to prohibit (i) all the respondents from entering into, taking steps to procure and/or take any action or step and/or conclude any contract which may lead to the transfer of the company

Fortenova Group MidCo B.V. and/or any other entity within the Fortenova Group, without the petitioner's consent and/or in breach of his rights; and (ii) respondents Pavao Vujnovac and Open Pass Limited from acquiring and/or take control of, directly or indirectly through companies, structures or other entities, of the shares or any part thereof which are presently held by the company Fortenova Group TopCo B.V. in the company Fortenova Group MidCo B.V.

2. The court provisionally upheld the petitioner's demand in terms of article 875(2) of the Code of Organisation and Civil Procedure, and ordered that the application be served on the respondents, who were granted a term within which to file their respective replies.
3. Respondents Open Pass Limited and Pavao Vujnovac (hereafter collectively referred to as "OpenPass") replied on the 12th April, 2024¹. Respondents Iter Stak Stichting and Iter BidCo B.V. (hereafter collectively referred to as "Iter") replied on the 12th April, 2024². Respondents Fortenova Group Stak Stichting and Fortenova Group TopCo B.V. (hereafter collectively referred to as "Fortenova") also replied on the 12th April, 2024³.
4. A hearing was held on the 15th April, 2024, during which the court upheld a request for these proceedings to be conducted in the English language⁴. Extensive submissions were made by the parties' legal counsel, and the application was adjourned for a decree in chambers, which is the purpose of the present measure.
5. In their respective replies, the respondents raise a significant number of pleas in order to contest the petitioner's request for an injunction. These pleas may be classified as follows: (i) lack of jurisdiction of this court; (ii) *lis pendens* as a consequence of the fact that similar, if not identical petitions, were filed by the petitioner before the judicial authorities of the Netherlands; (iii) petitioner's request is in breach of international sanctions and therefore cannot be entertained; and (iv) the elements required under the law of procedure for the issue of this injunction are not met by the petitioner.

¹ Fol.805.

² Fol.511.

³ Fol.525.

⁴ Fol.1605.

6. Insofar as these prove relevant to the issues which must be determined by this court in this particular proceeding, the facts are as follows. The dispute between the parties concerns a corporate structure involving companies registered in the Netherlands, Russia, Croatia and Malta. Fortenova Group Midco B.V. is wholly owned by Fortenova Group TopCo B.V., which in turn is wholly owned by Fortenova Group Stak Foundation. These entities are incorporated within the Netherlands. The beneficial interest of Fortenova Group Stak Foundation is vested in the petitioner as to 41.82%, with respondent Open Pass Limited being vested with 27.59% of said interest. The remaining beneficial interest is distributed among third parties who are not directly involved in these proceedings. Petitioner has become the subject of international sanctions which respondents state have effectively paralysed the operation of this corporate structure. In order to solve this impasse, respondents propose transferring Fortenova Group TopCo B.V., or the corporate structures held by it, unto respondents Iter, for a consideration they hold to be fair and just. The petitioner is objecting to this transfer, and holds that such is prejudicial to his rights.
7. Logically, the first plea which must be addressed by this court concerns its jurisdiction to take cognizance of the petitioner's claim. The matter falls to be regulated by the provisions of the Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments on civil and commercial matters (hereafter "the Regulation"). Despite petitioner's assertion that its claim is based on tort, the court considers that such claim is, in substance, impugning resolutions already approved by Fortenova and OpenPass which approve the transfer which the petitioner wishes to inhibit. Accordingly, such a claim falls under article 24(2) of the Regulation, which provides:

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

...

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that

seat, the court shall apply its rules of private international law;
...

8. Accordingly, and in light of the fact that the decisions which petitioner holds cause it prejudice were taken by organs of corporate structures having their seat in the Netherlands, it is the courts of that Member State which are seised with the exclusive jurisdiction to take cognizance of the substance of the petitioner's claim.

9. This notwithstanding, article 35 of the Regulation does provide that:

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

10. With respect to the application of this provision, it has been noted that: *«If the court granting the provisional/protective measure has no jurisdiction over the substance, the theory of ancillary jurisdiction cannot apply... This makes clear that a court with no jurisdiction over the substance can nevertheless grant provisional/protective measures. The provision does not itself give jurisdiction to do this: the court takes jurisdiction under national law. What the provision does is to remove two bars that would otherwise have prevented it from exercising that jurisdiction. The first is Brussels 2012, Article 5(1), which provides that persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in the Regulation. In other words, Member-State Rules of jurisdiction cannot normally be applied to defendants domiciled in another Member State. However, article 35 allows them to be applied in this special case. It does this by laying down a rule which, though it does not itself confer jurisdiction, nevertheless relates to jurisdiction in that it permits national rules to be applied. The second bar is the rule of lis pendens, which might be regarded as precluding a court from granting provisional/protective measures when the substance is being heard by the courts of another Member State. Article 35 makes clear that it does not do so»⁵.*

⁵ **Trevor Hartley**, Civil Jurisdiction and Judgments in Europe: The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention (2nd Edition, Oxford Private International Law Series, 2023), §22.10-22.12.

11. The leading case on the subject appears to be the decision of the 17th November 1998 on a preliminary ruling in the case between *Van Uden Maritime BV, trading as Van Uden Africa Line and Kommanditgesellschaft in Firma Deco-Line and another* (C-391/95), which at the time regarded article 24 of the Brussels Convention, and is substantially the same as Article 35 of the Regulation. Therein it was *inter alia* held that:

38 The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (Case 125/79 Denilauler v Couchet Frères [1980] ECR 1553, paragraph 15).

39 In that regard, the Court held at paragraph 16 of Denilauler that the courts of the place - or, in any event, of the Contracting State - where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.

40 It follows that the granting of provisional or protective measures on the basis of Article 24 is conditional on, *inter alia*, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.

12. That from the above, it transpires that provisional or protective measures (such as the one requested by the petitioner in these proceedings) may be issued by a court which is not seised of jurisdiction as to the substance of the claim. The ordinary rules provided for in the Regulation for the determination of jurisdiction are not applicable in this context, and the fact that there may be related or similar claims pending in other

jurisdictions is also not an obstacle to the application of article 35. The jurisdiction of the court from which the protective measure is requested is to be determined in accordance to national law. The same court must also consider whether there is a “real connecting link” between the subject matter of the requested measure and its territorial jurisdiction, as set out in the *Van Uden* judgment⁶. «*This suggests that, normally, they should be granted by the courts of the Member State in which the assets are located, though the CJEU did not explicitly state this*»⁷.

13. This court must therefore look to the domestic law in order to determine whether it has jurisdiction to take cognizance of the protective measure requested by the petitioner. It has already been noted that all of the respondents, except one, are domiciled or resident outside of Malta. Only the respondent Open Pass Limited is incorporated in Malta. Although this fact appears, by itself, to ground this court’s jurisdiction – at least against Open Pass Limited – in terms of article 742(1)(b) of the Code of Organisation and Civil Procedure, the second sub-article of article 742 also becomes applicable. This provision provides as follows:

The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.

14. National law therefore permits this court to decline jurisdiction where (i) the same cause or a connected cause is pending before a foreign court; (ii) that foreign court has a concurrent jurisdiction, and (iii) this court deems the continuation of the action pending before it to be vexatious, oppressive or unjust to the defendant or defendants.
15. In its determination on whether to apply article 742(2) or not, this court thinks it is appropriate to also consider the requirement of a “real connecting link”, imposed by the European Court of Justice. In this context, the court considers that respondents’

⁶ See also the decision *eHealth Limited vs. Sergio Giglio et* (First Hall of the Civil Court, 24/2/2020), which also concerned protective measures.

⁷ *Hartley*, loc cit, §22.15.

submissions in this respect are well-founded. The subject-matter of the protective measure being requested by the petitioner concerns transfers of corporate structures situated in the Netherlands, with assets which are not located in the territory of Malta. The fact that one of the respondent companies, which has a beneficial interest in this corporate structure, is incorporated in Malta does not constitute a “real connecting link” in the sense intended by the European Court of Justice. In the opinion of this court, it is the Dutch judicial authorities which are best-placed to decide on whether to issue the protective measure required by the petitioner, and how best to implement and effect that same protective measure.

16. In this same context, as well as in the context of article 742(2) of the Code of Organisation and Civil Procedure, it is also relevant to note that the petitioner has requested similar, if not identical, protective measures from the said Dutch judicial authorities⁸. These preceding attempts attest to the respondents’ claim that the petitioner’s attempt in this court’s jurisdiction is a vexatious one, aimed at procuring an advantage in this jurisdiction when that advantage was denied to it in other jurisdictions. This court is of the opinion that such repeated attempts constitute vexatious and oppressive litigation, and therefore constitute a basis for it to decline jurisdiction in terms of article 742(2), which is deemed applicable in terms of article 35 of the Regulation.

17. Consequently and for the above reasons, this Court is therefore:

- (i) revoking *contrario imperio* its decree of the 26th March 2024 whereby it provisionally upheld the petitioner’s demands;

⁸ Reference is made to (i) the decision of the 27th June 2023 by the District Court of Amsterdam (fol.576), wherein the petitioner requested defendants Fortenova *inter alia* to be prohibited from conducting any act or having any act conducted in respect of or in preparation for the sale until final judgment is given on the matter; (ii) the decision of the 18th December 2023 by the District Court of Amsterdam (fol.634), wherein the petitioner proceeded against defendants Fortenova and Iter, as well as Open Pass Limited, requesting *inter alia* «a prohibition against all defendants and Open Pass from taking any (legal) action in relation to the sale to Bidco or the passing of resolutions thereon until the Advocate General’s Opinion on Case No 23/00717 has been received and adequately considered by the preliminary relief judge and further order all parties to produce this opinion”; and (iii) the decision by the Enterprise Court, Amsterdam Court of Appeal of the 13th January 2023 (fol.708), instituted by the petitioner against Fortenova and Open Pass Limited with a number of requests, including to «prohibit Stak, Topco, Midco and Holdco from implementing in any way the resolutions adopted by Stak’s meeting of holders of depositary receipts”.

- (ii) upholding the respondents' plea as to the lack of jurisdiction, and is consequently abstaining from taking any further cognizance of the petitioner's demands;
- (iii) ordering that the costs of these proceedings be borne by the petitioner.

Decreed in chambers on the 23rd April, 2024

Hon. Mark Simiana, LL.D
Judge

Lydia Ellul
Deputy Registrar