Dutch Supreme Court upholds interim and partial final arbitral awards in Chevron-Ecuador saga

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In *Republic of Ecuador v Chevron Corporation (USA) and another (ECLI:NL:HR:2019:565)*, the Dutch Supreme Court upheld interim and partial final arbitral awards rendered in an UNCITRAL arbitration between Chevron and TexPet against Ecuador.

Published on 24-Apr-2019
Resource Type
Legal update: case report

Jurisdiction
The Netherlands

Speedread

Background

Article 1064(4) of the *former Dutch Civil Procedural Code* (former DCPC) (*Wetboek van Burgerlijke Rechtsvordering*) (in force until 1 January 2015) provides that a claim to set aside an interim arbitral award must be filed together with a claim to set aside a full or partial final award. The same is provided for in Article 1064a(3) of the *current Dutch Civil Procedural Code* (current DCPC) (as in force from 1 January 2015).

Article 1065(1)(e) of the former and current DCPC provides that an arbitral award can be set aside if it is in violation of the public order.

Facts

In 1964 and 1965, Ecuador granted a concession for oil production in an area of the Amazon to a consortium that included TexPet. In August 1973, the consortium and Ecuador signed a concession agreement for the period up to 6 June 1992. Following the expiry of the concession agreement, the state company PetroEcuador, that had obtained a majority interest in the consortium, continued oil production.

On 4 May 1995, Ecuador, PetroEcuador and TexPet signed a settlement agreement in which TexPet agreed to certain environmental remediation measures in exchange for Ecuador and PetroEcuador releasing TexPet, and other "releasees", of all environmental claims by Ecuador and PetroEcuador arising from the consortium's operations. A second agreement in which TexPet was forever discharged of any liability towards Ecuador followed on 30 September 1998.

In May 2003, a group of Ecuadorian citizens initiated court proceedings in Ecuador against Chevron for serious pollution caused by TexPet in the Lago Agrio region in the north of Ecuador. On 23 September 2009, Chevron and TexPet initiated arbitration proceedings against Ecuador based on a *bilateral investment treaty* (BIT) between Ecuador and the US that had entered into force on 11 May 1997. Chevron and TexPet requested a legal declaration to the effect that:

- Chevron and TexPet were released from any liability for pollution by the consortium based on the 1995 and 1998 agreements.
- Any judgment in the Lago Agrio proceedings could not be enforced against Chevron.
- Ecuador and PetroEcuador would be solely liable for the outcome of the Lago Agrio proceedings.

Furthermore, Chevron and TexPet requested that Ecuador be ordered to perform all measures necessary to prevent any judgment in the Lago Agrio proceedings from being enforced and for it to pay to Chevron and TexPet any amount that they would be ordered to pay in the Lago Agrio proceedings.

Upon Chevron's and TexPet's request, the arbitral tribunal rendered procedural orders to prevent the enforcement of any judgment in the Lago Agrio proceedings on 9 February and 16 March 2011. By a judgment of 14 February 2011 in the Lago Agrio proceedings, amongst other things, Chevron was ordered to pay USD 8.6 billion, which was upheld on appeal. In light of that decision, Chevron requested the tribunal to convert the 9 February and 16 March 2011 procedural orders into an interim award. The tribunal complied and in its first interim award of 25 January 2012 and its second interim award of 16 February 2012, the tribunal ordered Ecuador to take all measures necessary to suspend the enforcement of the judgment against Chevron in the Lago Agrio proceedings, whether in Ecuador or another jurisdiction, until a further arbitral order or award (see *Legal update, Chevron v Ecuador interim awards on enforcement of judgment and jurisdiction*). The tribunal also determined that Chevron and TexPet would be responsible for any costs or losses that Ecuador might suffer in performing its obligations, and that Chevron and TexPet were to deposit USD 50 million as security in that regard.

Following the first interim award, Chevron requested the Sucumbios Provincial Court to refuse or suspend the enforcement of the Lago Agrio judgment. This request was refused for violating access to justice. In 2012, the claimants in the Lago Agrio proceedings tried to enforce the judgment in Ecuador, Canada, Brazil and Argentina, without success.

In a fourth interim award on 7 February 2013, the tribunal, among other things, declared that Ecuador had violated the first and second interim awards under the BIT, the UNCITRAL Rules and international law (see *Legal update, Interim award against Ecuador for breach of earlier interim awards (PCA)*). In the first partial award of 17 September 2013, the tribunal ruled that Chevron and TexPet qualify as "releasees" within the meaning of the 1995 and 1998 agreements.

In the Netherlands, Ecuador applied to set aside the first, second and fourth interim awards and the first partial award. Ecuador alleged that the first and second interim awards violated public order as they prevented the enforcement of the Lago Agrio judgment within a reasonable period. The Hague District Court and The Hague Appeal Court dismissed Ecuador's application (see *Legal update, Ecuador loses another set-aside action before Dutch courts)*.

Ecuador appealed the setting aside of the interim and partial final awards to the Supreme Court. In the appeal, Ecuador mainly focussed on the setting aside of the provisional measures rendered in the first and second interim awards.

Decision

The Dutch Supreme Court upheld the Appeal Court's decision and dismissed Ecuador's application to set aside the interim and partial final arbitral awards.

The Supreme Court ruled that, under Article 1064(4) of the former DCPC, a setting aside claim can be brought against any decision in an arbitral award, including provisional measures. The nature of provisional measures does not prevent the possibility of setting aside such awards, as is explicitly confirmed for awards on the merits in Article 1043b(1) and (4), in connection with Article 1064 of the current DCPC, and as was the case for urgent relief awards under Article 1051(3), in connection with Article 1064 of the former DCPC. Whether or not the tribunal reserved the right to rule differently at a later stage does not change the foregoing, as the provisional measure has legal effect until that moment. Therefore, the first and second interim awards can, in principle, be set aside, as the claim to set aside the interim awards has been brought together with the claim to set aside the first partial award, which qualifies as a (partial) final award.

Pursuant to Article 1065(1)(e) of the former and current DCPC, an arbitral award can be set aside if it violates public order. State courts should be reluctant to set aside arbitral awards considering the public interest in effective arbitral proceedings, and particularly in light of the fact that setting aside proceedings should not be used as a *de facto* appeal. The Supreme Court assessed whether the interim awards violated the right to enforce a state court judgment within a reasonable period, as laid down in Article 6 of the *European Convention on Human Rights*. According to the Supreme Court, the interim awards did not violate public order. First, they did not directly prejudice the rights of the claimants in the Lago Agrio proceedings, and the measures were

temporary. Moreover, the interim measures were justified in order to avoid an irreversible situation pending the final outcome of the arbitration proceedings.

Comment

Contrary to what has been assumed by some to date, the Supreme Court has now ruled that provisional measures in interim arbitral awards can be set aside, as long as the claim to set aside the interim awards is filed together with a claim to set aside a (partial) final award. This decision may have an impact for long-lasting arbitration proceedings in particular, in which one or more interim awards and one or more (partial) final awards are rendered, potentially leading to state court interference.

As regards the setting aside claim itself, this Supreme Court decision confirms the prevailing opinion that claims to set aside an arbitral award for violation of public order are only awarded in extreme circumstances. As follows from this decision, even (temporary) arbitral orders not to enforce a state court judgment can be upheld in setting aside proceedings.

Case

Republic of Ecuador v Chevron Corporation (USA) and Texaco Petroleum Company (ECLI:NL:HR:2019:565) (12 April 2019).