Dutch Supreme Court reopens debate on setting aside of Yukos awards (Full update)

by *Practical Law Arbitration* with *Van Oosten Schulz De Korte Advocaten*

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In *Russian Federation v Veteran Petroleum Limited and others (ECLI:NL:HR:2021:1645)*, the Dutch Supreme Court annulled the judgment of the Court of Appeal reinstating the Yukos awards and referred the matter to another Court of Appeal to decide on allegations of fraud committed in the arbitration.

Speedread

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The Supreme Court has ruled that the Court of Appeal in The Hague wrongfully held that arguments by Russia on fraud committed in the arbitration should have been invoked in revocation proceedings and not in setting aside proceedings, as this would contradict the purpose of having the option to have an award either set aside or revoked. The matter has been referred to the Court of Appeal in Amsterdam to rule on this final issue.

Further, the Supreme Court ruled that the state courts have a final say on the tribunal's jurisdiction and should not set aside an award if they conclude that the tribunal had jurisdiction on another ground than the ground assumed by the tribunal itself. On the interpretation of the limitation clause of Article 45(1) of the Energy Charter Treaty (ECT), the Supreme Court ruled that this concerned whether Article 26 of the ECT was inconsistent with Russian law, and the Court of Appeal's finding that it was not, was not subject to review by the Supreme Court.

The Supreme Court dismissed Russia's other grounds for appeal.

The Supreme Court judgment reopens the option of a court finding that the awards should be set aside, not based on the tribunal wrongfully assuming jurisdiction, but based on fraud committed by the shareholders in the arbitration. The Yukos saga is not over yet. (*Russian Federation v Veteran Petroleum Limited and others (ECLI:NL:HR:2021:1645)*

Background

W hen an arbitration has its seat in The Netherlands, Article 1064(1) of the *Dutch Civil Procedural Code* (Wetboek van Burgerlijke Rechtsvordering) (DCPC), as in force until 1 January 2015 (on which date the Dutch arbitration law was amended), provides that arbitral awards that are not subject to appeal can only be challenged in setting aside or revocation proceedings.

Article 1065(1) of the DCPC provides the grounds for setting aside an arbitral award, including the following:

- Absence of a valid arbitration agreement (*Article 1065(1)(a)*).
- Composition of the tribunal was in violation of the applicable rules (*Article 1065(1)(b)*).
- Tribunal violated its mandate (*Article 1065(1)(c)*).
- Award is not duly signed or lacks reasoning (*Article 1065(1)(d)*).
- Award is in violation of public policy (*Article 1065(1)(e)*).

Article 1068 of the DCPC provides the grounds for revocation of an arbitral award, including the following:

- Award based on fraud committed by or with knowledge of the other party discovered after the award (*Article 1068(1)(a)*).
- Award based on documents that turn out to be false after the award (*Article 1069(1)(b)*).
- Party obtained documents withheld by the other party that would have influenced the tribunal's decision after the award (*Article 1069(1)(c)*).

A setting aside or revocation claim has to be brought within three months after the later of the date the judgment has been filed with the court or after service of the judgment with prior leave to enforce, or, in case of revocation only, within three months after the ground for revocation has become known.

Facts

Former Yukos shareholders, Hulley Enterprises Ltd, Veteran Petroleum Ltd and Yukos Universal Ltd initiated arbitration proceedings against Russia based on Article 26 of the Energy Charter Treaty (ECT), claiming that Russia expropriated their investments. The tribunal assumed jurisdiction and ruled that Russia violated Article 13(1) of the ECT by orchestrating Yukos' bankruptcy and ordered it to pay around USD50 billion in damages (see *Legal update, Majority shareholders in Yukos awarded US$50 billion*).

In 2016, the District Court of The Hague granted Russia's application to set aside the awards, deciding that the tribunal did not have jurisdiction to hear the claims on the grounds as applied by the tribunal (see *Legal update, The setting aside of the Yukos awards: full update*).

In 2018, the Court of Appeal in The Hague upheld the shareholders' objections in respect of Russia's assertions on fraud committed by the shareholders in the arbitration (see *Legal update, Court allows Russia's unclean hands argument against former Yukos shareholders (Court of Appeal in The Hague)*). The Court of Appeal overturned the District Court decision, holding that the tribunal had jurisdiction on an alternative basis, and revived the Yukos awards in 2020 (see *Legal update, Court of Appeal in The Hague overturns District Court decision and revives Yukos awards*).

Russia filed an appeal with the Supreme Court on eight different grounds and filed a request to suspend the enforcement of the awards pending the appeal process. The Supreme Court ruled that the chances of Russia's setting aside claim succeeding did not justify a suspension of the enforcement of the Yukos awards (see *Legal update, Dutch Supreme Court refuses to suspend enforcement of Yukos awards*). The Attorney-General advised the Supreme Court to maintain the Yukos awards by rejecting Russia's appeal (see *Legal update, Attorney-General advises Dutch Supreme Court to keep Yukos awards in place*).

Decision

The Supreme Court annulled the Court of Appeal in The Hague's decision and referred the case to the Court of Appeal in Amsterdam to decide on Russia's claim that the awards should be set aside because the shareholders committed fraud in the arbitration. It dismissed all of Russia's other grounds for appeal.

Can fraud in an arbitration only be put forward in revocation proceedings?

First, the Supreme Court ruled on Russia's appeal against the Court of Appeal's decision that allegations justifying revocation of the award cannot lead to the setting aside of the award.

The Supreme Court overturned this decision. It ruled that, if the award came about under the influence of fraud, that can be a ground to set aside the award for violation of public policy. A party can therefore invoke this ground in setting aside proceedings. Neither the legislation nor the parliamentary history indicates that a party can only invoke certain assertions in revocation proceedings if they also qualify as a ground to set aside the award. After all, both setting aside and revocation cause the award to be annulled. A claim for revocation can be filed at the latest within three months after the ground for revocation has become known. This rule serves to expand the options to annul an award, including in cases where the period to file a claim to set aside the award has lapsed.

The Supreme Court considered that the grounds to set aside the award have to be included in the summons in setting aside proceedings on penalty of loss of rights. However, a party can further expand on an initial setting aside ground in the course of the proceedings, including on appeal, within the limitations imposed by the principle of due process. Russia had stated that it became aware of fraud committed by the shareholders in the arbitration (by submitting false documents, withholding documents and paying a witness) after the District Court judgment, and it invoked that in its first filing on appeal. The Supreme Court referred the case to the Court of Appeal in Amsterdam to rule on this subject, including on if allowing Russia's further explanation of the setting aside ground on appeal violated due process.

Could Russia be bound to provisionally apply Article 26 of the ECT?

Russia argued that the Court of Appeal could not have ruled that the tribunal had jurisdiction based on grounds the shareholders first brought forward in the setting aside proceedings that were not addressed by the tribunal itself. The Supreme Court rejected that argument, ruling that the question of whether a tribunal has jurisdiction is a matter in which the state courts have a final say. The state courts do not have to exercise constraint in assessing if a valid arbitration agreement was agreed to. Accordingly, the state courts' assessment is not limited to the grounds for jurisdiction assumed by the tribunal itself. Otherwise the court would have to set aside an award even though the parties' intention was to agree to arbitration and that would not be in the interest of effective arbitral justice.

Applying the principles of Article 31 to 33 of the *Vienna Convention on the Law of Treaties*, the Supreme Court then turned to the interpretation of the heavily debated limitation clause of Article 45(1) of the ECT, providing that provisional application of the ECT is limited to the extent such provisional application is not inconsistent with a member state's constitution, laws or regulations. Different standards had been argued, namely, that it concerned whether:

The principle of provisional application of treaties violated Russian law.

A specific provision of the ECT (*Article 26 of the ECT*) violated Russian law.

Provisional application of a provision of the ECT violated Russian law.

The Supreme Court was inclined to follow the third interpretation. Either way, Russia's appeal could not succeed, because the Court of Appeal had answered the question of whether Russia could be bound to provisionally apply Article 26 of the ECT by applying the three different standards. For the same reason, the Supreme Court saw no reason to request the Court of Justice of the European Union (CJEU) to decide on this issue. The Supreme Court also ruled that the second interpretation of the limitation clause, defended by Russia, did not correspond to the words "not inconsistent with its constitution, laws or regulations". According to the Supreme Court, this wording does not indicate that Article 26 of the ECT could not be provisionally applied if Russian law does not provide for arbitration within the meaning of Article 26 of the ECT, but that the respective provision cannot be inconsistent with Russian law. The Supreme Court ruled that this interpretation corresponded to the context and purpose of the ECT, that is, to encourage foreign investments in the energy sector. The remainder of Russia's argument in this respect was based on a debate on the interpretation of Russian law, but the application of foreign law is not subject to review by the Supreme Court.

Did the shareholders make an investment and did they qualify as investors within the meaning of the ECT?

The Supreme Court ruled that the shareholders qualified as investors and that their shares qualified as investments within the meaning of Article 1(6) to (7) of the ECT, because the shares related to an economic activity in the energy sector. The shareholders were incorporated under the laws of Cyprus and the Isle of Man respectively, so that they qualified as entities under the laws of another member state. There was no basis in international investment law to rule differently, even though the shareholders were ultimately controlled by Russian citizens. Again, the Supreme Court ruled that this interpretation could reasonably not be questioned, so that there was no need to address the CJEU.

Should the awards be set aside due to alleged illegal acts of the shareholders and Khodorkovsky?

The Supreme Court agreed with the Court of Appeal that, even if it was assumed for the sake of argument that transactions in 1995 and 1996 preceding the transfer of the shares to the shareholders in 1999 to 2001 were procured in an illegal matter, this had no consequences for the subsequent investments by the shareholders. Whether the shareholders engaged in illegal acts after they obtained the shares was irrelevant and could not be assessed by the Supreme Court, being a factual matter.

Further, the Supreme Court considered that an arbitral award can only be set aside for violation of public policy if the content of the award, or the performance of the award, violated mandatory law of such a fundamental nature that compliance therewith cannot be restrained by procedural limitations. Russia did not sufficiently dispute the tribunal's decision that acts by Khodorkovsky and related persons did not concern the shareholders, so that this ground for appeal was also dismissed.

Should the award be set aside because the tribunal failed to request advice from the relevant tax authority?

Russia argued that the award should be set aside because the tribunal failed to request advice from the Russian tax authority pursuant to Article 21(5) of the ECT. Given that the tribunal "may take into account" conclusions by the

tax authority, the Supreme Court ruled that the tribunal's failure to approach the Russian tax authority would not have led to a different outcome and was not material enough to justify setting aside of the award.

Other appeal grounds

The Supreme Court rejected Russia's other appeal grounds, concerning the role of the secretary in drafting the awards and the asserted lack of reasoning of the awards as regards Yukos' use of "sham" companies, as these subjects did not concern a matter of unity or evolution of law and therefore are not open for review by the Supreme Court.

Comment

The Supreme Court's decision to refer the matter to the Court of Appeal in Amsterdam to assess Russia's assertions on fraud committed by the shareholders in the arbitration, causes the Yukos saga to continue. This may have been avoided had the Court of Appeal in The Hague, for the sake of completeness, ruled on whether Russia was barred from raising this argument, not because it should have raised it in revocation proceedings, but because it would violate due process to allow this argument, or had it ruled on the substance of Russia's arguments. The Court of Appeal in Amsterdam will now have to rule on this final issue.

Given the interests at stake, it is highly likely that another appeal to the Supreme Court will follow regardless of what the Court of Appeal in Amsterdam decides.

After a final decision following the referral to the Court of Appeal in Amsterdam, the outcome could effectively be the same (awards set aside, due to fraud in the arbitration) as following the District Court judgment (awards set aside, due to lack of a valid arbitration agreement), following years of litigation.

The Supreme Court chose not to involve the CJEU even though Russia requested that for two separate reasons, which could have finally put to bed different approaches in interpreting the ECT, most notably the interpretation on the limitation clause in Article 45(1) of the ECT.

Notably, the Supreme Court ruled differently from the Attorney-General's advice to maintain the judgment by the Court of Appeal in The Hague. It even ruled differently from its earlier provisional ruling, on the request for suspension of the enforcement of the awards, that there was insufficient reason to rule contrary to the Court of Appeal's decision that Russia's arguments on fraud committed in the arbitration could not be invoked in setting aside proceedings but only in revocation proceedings.

Case

Russian Federation v Veteran Petroleum Limited and others (ECLI:NL:HR:2021:1645) (5 November 2021).

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