

Court of Appeal in The Hague rejects application to set aside award ruling that the tribunal lacked jurisdiction

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

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In *X and others v Venezuela (ECLI:NL:GHDHA:2021:14)*, the Court of Appeal in The Hague dismissed an application to set aside an award in which the tribunal ruled that it lacked jurisdiction.

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The Court of Appeal in The Hague has dismissed an application by a number of Spanish citizens (claimants) to set aside an award in which the tribunal ruled that it lacked jurisdiction to rule on a claim for damages of USD240 million due to the expropriation of a food distribution company by Venezuela.

First, the claimants argued that the tribunal failed to address the parties' statements on the interpretation of "investor" within the meaning of article I(1)(a) of the Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (Treaty). The court dismissed this argument, ruling that the tribunal had taken into account the parties' statements in this respect and had ruled that persons with dual citizenship (such as the claimants) did not qualify as investors. The court further ruled that the tribunal had not failed to take into account the *travaux préparatoires* of the Treaty. It also rejected the argument that the tribunal violated its mandate by taking into account the *travaux préparatoires* of the ICSID Convention, ruling that the tribunal was allowed to independently assess this.

Second, the claimants argued that the award should be set aside because the tribunal incorrectly ruled that it lacked jurisdiction. The court also rejected this argument. It ruled that Dutch law does not provide for the setting aside of an award in which the tribunal ruled that it lacked jurisdiction. In such cases, access to justice is not compromised as the claimants can file a claim in state courts. The court dismissed the claimants' argument that the award was in violation of public order as it prevented the claimants from exercising their rights against Venezuela. According to the court, (Dutch) public order does not require state courts to ensure access to a tribunal in international investment arbitrations. Moreover, setting aside the award would not necessarily mean that the tribunal would have jurisdiction, as it is up to the tribunal to decide on that. The court also ruled that the award was properly reasoned on this subject, as the tribunal had extensively assessed whether the claimants qualified as investors, taking into account the interpretation rules from the Vienna Convention on the Law of Treaties.

Case: *X and others v Venezuela (ECLI:NL:GHDHA:2021:14)* (19 January 2021).

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