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out that the Convention regulates, at least in part, the modalities for the invocation of a State party's responsibility for failure to prevent or punish genocide.[24]

Ohne Völkermord kann man sich nicht auf die Völkermordkonvention berufen. Und wenn ein solcher tatsächlich vorliegt, gilt es zu klären, was Staaten gemäß der Völkermordkonvention dagegen tun dürfen – und, mehr noch, was nicht. Das erste Vorbringen der Ukraine ist so gesehen eine Vorfrage für das zweite. Damit wäre es während des Verfahrens in der Hauptsache zu klären gewesen.[25]

VI. Ausblick

Der IGH hat die lebhafte Debatte rund um die Reichweite des Verbots von missbräuchlichen Vertrags-Interpretationen[26] regelrecht „abgedreht". Das ist fernab universitärer Elfenbeintürme eine real- und rechtspolitische Niederlage: Sowohl für die Ukraine als auch für jene 33 Staaten, die ihre Klageschrift als Nebenintervenienten unterstützt haben. Der IGH wird der Instrumentalisierung der Völkermord-Konvention nur zur Hälfte widersprechen und letztlich nichts Neues feststellen: Kein einziger UN-Bericht oder sonstige seriöse Untersuchungen der Lage vor Ort haben Anhaltspunkte für einen Genozid im Donbass gesehen.

Wer das völkerrechtliche Glas halbvoll sehen will, kann immerhin darauf verweisen, dass diese Behauptung nun einmal mehr richtiggestellt werden wird – und das nicht von irgendwem, sondern dem höchsten Gericht, das die Vereinten Nationen beziehungsweise allgemein das Völkerrecht zu bieten haben. Russland kann dem IGH, wo es bis vor Kurzem seit seinem Bestehen einen Richter gestellt hat und der alle Rechtstraditionen der Welt abbildet beziehungsweise abbilden soll, nur schwer „westlichen Bias" und dergleichen unterstellen.

Der bittere Beigeschmack bleibt dennoch. Russland und die Ukraine kämpfen auch um die globale Deutungshoheit über diesen Krieg. So offensichtlich die Völkerrechtswidrigkeit der russischen Aggression auch sein mag, so schwer ist es, den vielen Scheinargumenten entgegenzutreten, die Russland in die Diskursarena wirft. Ein eindeutiges Urteil des IGH hätte viel dazu beigetragen, in Zeiten von Propaganda und Desinformation für Klarheit zu sorgen. Er erachtet sich hierfür jedoch nicht zuständig.

24 Separate Opinion of Judge Charlesworth, verfügbar unter https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-08-en.pdf, Rn. 17 f.

25 Ibid.

26 Siehe dazu etwa *Freya Baetens*, Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?, *EJIL:Talk!*, 15.10.2019, verfügbar unter: https://www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful/. Siehe auch die gemeinsame abweichende Meinung von Richter Robinson und Richterin Sebutinde, Rn. 9: „The Judgment shows that the majority do not sufficiently appreciate the significance of the principle of good faith in international law in general and its application to the circumstances of this case, in particular."

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The Yukos saga in the Netherlands – a summary of two decades of legal battles

JURJEN DE KORTE / GEERT WILTS

Now that after nearly two decades the Yukos saga appears to have finally come to an end in the Netherlands, it seems useful to recap what happened and why Russia eventually failed to prevent the enforcement of the USD50 billion arbitral award, reported to be the largest amount awarded in arbitration ever.

I. Procedural background

In February 2005 three former shareholders of Yukos Oil Company initiated arbitration proceedings at the Permanent Court of Arbitration in The Hague against Russia based on Article 26 of the Energy Charter Treaty (ECT), claiming that Russia expropriated their investments. In interim awards of 30 November 2009 the arbitral tribunal assumed jurisdiction. In the final awards of 18 July 2014 the arbitral tribunal ruled that Russia violated Article 13(1) of the ECT by orchestrating Yukos' bankruptcy and ordered it to pay around USD50 billion in damages.[1]

On 10 November 2014 Russia initiated proceedings before the District Court of The Hague to set aside the interim and final awards. On 20 April 2016, the District Court of The Hague granted Russia's application, deciding that the tribunal did not have jurisdiction to hear the claims on the grounds as applied by the tribunal.[2]

The shareholders appealed with the Court of Appeal in The Hague. On appeal Russia for the first time alleged that the arbitral awards should be set aside for the additional ground that the shareholders allegedly committed procedural fraud in the arbitration. On 25 September 2018, the Court of Appeal rejected Russia's new argument by holding that procedural fraud is not a ground for setting aside but only for revocation of an arbitral award, and that the opportunity to claim revocation had passed. In its final decision of 18 February 2020 the Court of Appeal overturned the District Court decision, holding that the arbitral tribunal had jurisdiction on an alternative basis, rejecting all invoked grounds for setting aside and revived the arbitral awards.

Russia then filed an appeal with the Supreme Court on eight different grounds and filed a request to suspend the enforcement of the arbitral awards pending the appeal process. On

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1 https://pca-cpa.org/en/cases/61/.

2 https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2016:4230.

4 December 2020 the Supreme Court ruled that the chances of Russia's setting aside claim succeeding did not justify a suspension of the enforcement of the arbitral awards. On 5 November 2021 the Supreme Court rejected most of Russia's grounds for appeal. The Supreme Court however ruled that procedural fraud can be a ground for setting aside an arbitral award and for that reason annulled the Court of Appeal in The Hague's decision on that point and referred the case back 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.

On 20 February 2024 the Court of Appeal in Amsterdam rejected Russia's allegation that the arbitral awards should be set aside because the shareholders committed procedural fraud in the arbitration by holding that Russia had not raised this argument in time. In an *obiter dictum* the Court of Appeal rejected the allegations that the arbitral awards could otherwise be set aside.

II. Court of Appeal in The Hague ruling of 18 February 2020

Most of Russia's arguments for setting aside of the arbitral awards were dismissed in the 18 February 2020 judgment of the Court of Appeal in The Hague.

1. Did an arbitration agreement exist due to provisional application of the ECT?

The Court of Appeal in The Hague ruled that whether or not an arbitration agreement existed depended on the interpretation of Articles 26 and 45 of the ECT under Russian law, subject to the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). The Court of Appeal assessed that in 1994, the ECT was signed on Russia's behalf but that it never entered into force in accordance with Article 44 of the ECT in the absence of an instrument of ratification, acceptance or approval by Russia. The court therefore considered whether the ECT applied provisionally to the extent that this was not inconsistent with Russia's constitution, laws or regulations (the limitation clause; Article 45(1) of the ECT). The Court of Appeal ruled that a court may take into account arguments brought forward by a party for the first time in setting aside proceedings, as state courts have the final say as to whether an arbitration agreement exists. Moreover, the court held that this approach contributes to the effectiveness of arbitration proceedings, as it avoids arbitral awards being set aside only because the tribunal failed to assert the correct reason for its jurisdiction. In accordance with Article 31 of the VCLT, the Court of Appeal considered the extent to which the application of the arbitration provision of Article 26 of the ECT fell within the limitation clause. The Court of Appeal followed the interpretation given by the shareholders in the setting aside proceedings, namely, that provisional application of any provision of the ECT depended on whether such provisional application itself would be inconsistent with a rule of Russian law. Contrary to the tribunal's decision, the Court of Appeal ruled that a signatory that has not filed a declaration objecting to provisional application on the basis of Article 45(2)(a) of the ECT, can still invoke the limitation clause. Given that the purpose of the ECT is to promote investments in the energy field, the court interpreted the limitation clause as relating to a signatory's legislation on the provisional application of treaties, as opposed to a signatory's legislation on investment arbitration (in case of Article 26 of the ECT). The *travaux préparatoires* of the ECT confirmed the Court of Appeal's interpretation of Article 45 of the ECT. Applying this interpretation, the Court of Appeal ruled that there was no

Russian law prohibiting provisional application of (categories of) treaty provisions. For the sake of completeness, the Court of Appeal also addressed the interpretation given to Article 45(1) by Russia, which is that the possibility of applying a treaty provisionally, is limited to treaties that are not contrary or supplemental to Russian federal laws. Russia argued that, without parliamentary approval (which was not given to the ECT), its government could not grant to third parties authority to decide disputes, whose jurisdiction belongs to its judiciary. However, the court ruled that Russia's legislation did enable international arbitration of investment disputes. Moreover, Russia's government's authority to agree to the provisional application of unratified treaties was not limited under Russian law. Amongst other things, this was evidenced by the fact that for a number of years Russia applied several treaties provisionally pending ratification thereof. The court dismissed Russia's argument that arbitration in accordance with Article 26 of the ECT would be of a public law nature and could therefore not be subject to arbitration. The court also ruled that Article 26 of the ECT was not in violation of a number of provisions of Russian substantive law submitted by Russia. It therefore concluded that the tribunal had jurisdiction over the dispute between the Yukos shareholders and Russia on the basis of Article 26 of the ECT.

2. Did the Yukos shareholders qualify as investors?

Applying Article 31 of the VCLT, the Court of Appeal ruled that each of the shareholders qualified as an "investor" within the meaning of Article 1(7) of the ECT, investing in a country other than its own, as the seat of incorporation of the Yukos shareholders (Cyprus and Isle of Man) was outside of Russia. The court ruled that there was no legal principle of international law holding that investment treaties do not offer protection to entities fully controlled by subjects of the host country, nor that an active economic contribution into the host country was required for the definition of 'investment' under Article 1(6) of the ECT. International investments made in violation of the laws of the host country were not to be protected, but this did not necessarily lead to the tribunal's lack of jurisdiction.

3. Did the tribunal have jurisdiction to hear claims related to taxation measures?

According to the Court of Appeal in The Hague, Article 21(1) of the ECT, which provides that nothing in the ECT creates rights or imposes obligations with respect to taxation measures, does not relate to the jurisdiction of the tribunal. Even if it did, Article 21(1) only applies to *bona fide* taxation measures, and the measures imposed on Yukos and its shareholders were not *bona fide*.

4. Did the tribunal violate its mandate?

The court then considered whether the tribunal had violated its mandate. The fact that the tribunal failed to submit the dispute to the competent Russian tax authorities in accordance with Article 21(5)(b) of the ECT was held insufficient to justify setting aside of the award, as it was inconceivable that Russia suffered any disadvantage as a result. The Court of Appeal further ruled that arbitrators have a wide margin of appreciation to assess the amount of damages, and that the calculation of damages by the tribunal (consisting of the value of the Yukos shares and missed dividends) fell well within that scope, also because it concerned a hypothetical situation (the situation in which Yukos would not have been expropriated) and

Russia had failed to provide a concrete alternative damages calculation. The court dismissed further arguments by Russia that the tribunal guessed what Russia might have done and that it thus went beyond the procedural debate.

5. Was the composition of the tribunal in violation of the UNCITRAL Rules?

Further, the Court of Appeal found that it could not be established that the composition of the tribunal was in violation of the applicable UNCITRAL rules. Even if the tribunal secretary had drafted parts of the award it was not established that the tribunal secretary took material decisions.

6. Did the award lack meaningful reasoning?

The Court of Appeal also ruled that it had not been established that the award lacked any meaningful reasoning but, at most, that the reasoning was incorrect, which does not constitute a ground for setting aside an award.

7. Was there a violation of public policy?

Lastly, the Court of Appeal dismissed Russia's public policy arguments. As to the "unclean hands" argument, which, in summary, concerned fraudulent, corrupt and illegal activities by the shareholders, the court found that the tribunal had not failed to take into account these alleged activities but had rightfully ruled that such activities were not relevant in relation to the shareholders' claims, as only illegalities that occur at the time the investments are made, are relevant. The alleged illegalities were performed by others and not the shareholders and the shareholders lawfully acquired the Yukos shares.

III. Supreme Court ruling of 5 November 2021

Following the 18 February 2020 judgment of the Court of Appeal in The Hague, the Supreme Court dealt with eight grounds raised by Russia.[3]

1. 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

3 See also: *Stan Putter,* Dutch Supreme Court decision – 5 November 2021 – former Yukos shareholders v. Russian Federation, DRRZ 2022, p. 74–77.

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.

2. 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 VCLT, 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.

3. 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 en-

ties 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.

4. 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 manner, 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.

5. 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.

6. 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.

IV. Court of Appeal in Amsterdam ruling of 20 February 2024

Following referral by the Supreme Court the Court of Appeal in Amsterdam ruled that Russia lost the right to argue that the arbitral awards should be set aside because of procedural fraud because it did not raise this argument during the setting aside proceedings in first instance before the District Court in The Hague while it did at that time have the information relevant for its argument. As an *obiter dictum,* the Court of Appeal ruled that even if Russia had raised this argument in time it would have been rejected. To that end it held that setting aside for procedural fraud can only be justified if it can be accepted that the arbitral tribunal would have ruled differently had the tribunal known the true facts. Here, the Court of Appeal ruled that the subject of control over the shareholders, on which the shareholders allegedly

misinformed the arbitral tribunal, was in fact not relevant for the arbitral tribunal. The Court of Appeal based this on the interim awards, where the arbitral tribunal had ruled that the admissibility of the shareholders as investors under art. 1(7) ECT was not dependent on who controlled the shareholders. Russia had further asserted that one of the witnesses was paid USD 200,000 by a party related to the shareholders while the tribunal had not been informed thereof. The Court of Appeal held that the testimony of this witness was not decisive for the outcome of the arbitration.

V. Final remark

The 20 February 2024 ruling of the Court of Appeal in Amsterdam marks nearly two decades of legal battles. It is subject to appeal to the Supreme Court by 20 May 2024 (as of the moment this publication was finalised, it is unknown if Russia has appealed). For such an appeal and due to the sanctions imposed against Russia the Dean of the bar in The Hague will likely be requested to appoint Supreme Court counsel for Russia. Russia will in any event only be able to appeal to the Supreme Court if a lawyer admitted to the bar of the Supreme Court finds an arguable ground, which seems a tall order given the fact that the Amsterdam Court of Appeal also rejected Russia's arguments in an *obiter dictum*. Also for that reason, it seems likely that the present ruling will be the final chapter of the Yukos saga.