

# Dutch court refuses Russia's request to suspend enforcement of BIT awards in favour of investors in Crimea (Court of Appeal in The Hague)

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In *Russian Federation v Everest Estate LLC and others* (ECLI:NL:GHDHA:2019:1452), the Court of Appeal in The Hague refused Russia's request to suspend enforcement of awards made under the Russia-Ukraine bilateral investment treaty (BIT), which awarded 19 Ukrainian claimants damages following the expropriation of their Crimean properties.

## Speedread

The Court of Appeal in The Hague has refused Russia's request to suspend enforcement of awards in which 19 Ukrainian claimants were awarded damages following the expropriation of their Crimean properties.

Following the annexation of Crimea by Russia in March 2014, the new Crimean authorities issued a decree to the effect that all Ukrainian state possessions and abandoned possessions be considered as Crimea's possessions. Subsequently, the respondents in these proceedings (Everest) claimed to have possessions that were expropriated without compensation being paid. In June 2015, Everest filed a Request for Arbitration in The Hague under the 1998 bilateral investment treaty (BIT) between Russia and Ukraine. Russia did not participate in the arbitration. The tribunal ruled that it had jurisdiction in 2017 and, in its final award in 2018, it upheld most of the claims. In August 2018, Russia applied to the Court of Appeal in The Hague to set aside the awards for lack of a valid arbitration agreement or to revoke the awards based on fraud and due to documents having been withheld. In December 2018, Russia also filed a request to suspend the enforcement of the awards.

This decision concerned the request to suspend enforcement only. First, the court ruled that it had jurisdiction to rule on the request, despite Everest not having sought enforcement in the Netherlands.

In dismissing Russia's request to suspend enforcement of the awards, the court found that Russia's chances of success in its claim to set aside the awards were not promising. Among other things, the dispute concerned a difficult issue and an exceptional situation under the BIT, with few precedents. Moreover, both parties submitted authoritative but contradictory opinions on the issues involved, and several other tribunals have ruled that the BIT does apply to similar matters. Similarly, the court did not consider that Russia's claim for revocation of the awards had a realistic chance of succeeding, as it had failed to file its claim for revocation in a timely manner after the discovery of fraud or documents having been withheld.

The court will now go on to make a final ruling on Russia's claims for setting aside and revocation of the arbitral award. (*Russian Federation v Everest Estate LLC and others* (ECLI:NL:GHDHA:2019:1452) (11 June 2019).)

## Background

Arbitrations with their seat in The Netherlands commenced after 1 January 2015 are governed by the (new) *Dutch Civil Procedural Code* (DCPC) (*Wetboek van Burgerlijke Rechtsvordering*).

Article 1066(1) of the DCPC provides that a claim to set aside or revoke an arbitral award does not suspend the enforcement of the award. However, pursuant to Article 1066(2) of the DCPC, the court may suspend enforcement until a final decision on the setting aside and revocation claims has been rendered, if it finds reasons to do so. If the request for suspension is granted, the court may order the party requesting suspension to provide security (*Article 1066(5), DCPC*). If the request is dismissed, the opposing party may be ordered to provide security (*Article 1066(5), DCPC*).

## Facts

On 27 November 1998, Russia and Ukraine entered into a bilateral investment treaty (BIT). At that time, Crimea was a part of Ukraine. Following a referendum, Crimea was declared an independent state on 17 March 2014. One day later, the new Crimean authorities signed an annexation treaty with Russia, pursuant to which the Crimean Republic became a part of Russia. The Russian parliament ratified the annexation treaty on 21 March 2014.

On 30 April 2014, the newly formed Crimean Republic issued a decree to the effect that all state possessions of Ukraine and all abandoned possessions in Crimea be considered possessions of the Crimean Republic. On 19 June 2015, Everest and others (collectively referred to in this update as Everest) filed a request for UNCITRAL arbitration with the Permanent Court of Arbitration in The Hague, claiming to have had possessions expropriated without compensation being paid. In subsequent letters, Russia stated that any tribunal, no matter its composition, lacked jurisdiction to rule on the claims filed against it. Russia did not participate in the arbitration. On 20 March 2017, the tribunal ruled that it had jurisdiction. On 2 May 2018, in a final decision on the merits, the tribunal upheld most of the claims.

On 29 August 2018, Russia filed an application with the Court of Appeal in The Hague to set aside or revoke both the jurisdictional decision and the final award on the merits. On 4 December 2018, Russia also filed a request to suspend the enforcement of the arbitral awards or, in the alternative, to order Everest to provide security with the same court.

Russia brought forward six reasons arguing that there was no valid arbitration agreement:

- There was no investment in "the territory of the Contracting Party", as provided for in Article 1(1) of the BIT, as at the time the investments were made, Crimea was a part of Ukraine.
- Everest did not make an "investment", as it concerned a domestic investment.
- Everest did not qualify as "investors", as an investor should be allowed to make investments on the territory of another treaty party, while under Ukrainian law it was and is not possible to make foreign investments in Crimea.

- The investments made by Everest are in violation of the law, as they were obtained by corruption, fraud and violence.
- Pursuant to Article 10 of the BIT, the dispute as to the territorial status of Crimea should have been resolved first, in a separate arbitration.
- The tribunal was not allowed to assess the claims of all of the claimants in one procedure, which constitutes a violation of the arbitration agreement and the mandate of the tribunal.

Furthermore, Russia argued that the awards should be revoked based on fraud discovered after the arbitration, as well as due to material documents having been withheld during the arbitration.

On 8 March 2019, Everest filed a defence, arguing that the Court of Appeal in The Hague lacked jurisdiction to suspend enforcement of the arbitral awards in the absence of any steps being taken to enforce the awards in the Netherlands. They also requested that the court order Russia to provide security, should enforcement be suspended. On 2 April 2019, Russia responded to the defence and counter-request of Everest. A hearing took place on 9 April 2019.

## Decision

The Court of Appeal in The Hague dismissed Russia's request for suspension of the enforcement of the arbitral awards.

First, the court ruled that it had jurisdiction to rule on the request for suspension. It found that Dutch procedural law applies to proceedings in the Netherlands, unless otherwise provided for in treaties or regulations. Article 1066 of the DCPC does not require that enforcement steps must have been taken in the Netherlands. The court pointed to Article 36 of the UNCITRAL Model Law, which was the basis of Article 1066 of the DCPC and which includes almost exactly the same wording as Articles V and VI of the New York Convention. Those articles distinguish between the suspension of the award and adjournment of the decision on a request for enforcement. Suspension should be requested in the country in which, or under the laws of which, the award was rendered. Adjournment should be requested in the country where enforcement of the award is sought. There was no reason to assume that the courts having jurisdiction to rule on suspension can only suspend the enforcement if enforcement is in fact requested in that country.

The court then turned to the issue of suspension itself. In suspension proceedings, the court only needs to render a decision on the chances of success of the award being set aside or revoked. The court does not need to make a full assessment of the alleged grounds to set aside or revoke the award.

As to Russia's first three reasons to set aside the awards, the court addressed the fact that it concerned an exceptional situation under the BITs, with little precedent. Both parties submitted authoritative opinions reaching different conclusions. Russia requested permission to file a statement of reply in the setting aside proceedings, as this was a complicated issue. For that reason alone, the court did not consider the chances of success of the claim to set aside the awards to be promising. Moreover, five different tribunals in seven separate cases have ruled that the BIT did apply, which has also been confirmed by the Swiss Supreme Court (*see Legal update, Swiss Supreme Court dismisses challenges to interim awards on jurisdiction rendered in investor-state arbitrations*).

On Russia's fourth argument to set aside the awards, the court stated that most of the instances of corruption, fraud and violence that Russia brought forward lacked relevance for the current matter as they did not relate to Everest, or their possessions, which were the subject of the arbitration. Even if the few instances that may be relevant did

indeed concern corruption, fraud or violence, that would not be sufficient to set aside the entire awards, but only parts thereof, while remission to the tribunal may also be an option (*Article 1065a, DCPC*).

The court further ruled that Russia's fifth argument to set aside the awards was likely to fail. Article 10 of the BIT applies to disputes between the contracting parties (that is, Russia and Ukraine). The dispute between Russia and Everest does not qualify as such. Therefore, that dispute could be resolved without a decision on Crimea's territorial status being made. Furthermore, Article 10 of the BIT does not state that proceedings based on that article must precede the arbitration proceedings.

As to Russia's sixth argument, the court stated that Article 9 of the BIT allows for multiple investors to jointly file a claim against a contracting state. This is also very common in similar BIT arbitrations.

All in all, the court considered that Russia had failed to persuade it that its claim to set aside the awards had a promising chance of success. Therefore, whether or not Russia may have waived its right to pursue these arguments did not need to be assessed. The court disregarded other arguments made by Russia in the setting aside proceedings that were only referred to in the request for suspension, without a further explanation being given.

Furthermore, the court observed that Russia's claim for revocation of the awards did not have a promising chance of success either. Although Russia did not participate in the arbitration, it was informed of every step in the process and received all documents submitted. In the court's preliminary opinion, Russia therefore failed to file its claim for revocation within the three-month deadline after discovery of fraud or documents having been withheld (*Article 1068, DCPC*).

The court concluded that the claim to set aside or revoke the arbitral awards lacked a promising chance of success. Balancing the interests of the parties did not lead to a different conclusion. Therefore, the court dismissed Russia's request for suspension of the enforcement of the awards.

In the court's opinion, there was no risk that Russia would be unable to recover from Everest if the arbitral awards are later set aside or revoked. Therefore, it dismissed Russia's alternative request to order Everest to provide security.

The court will now go on to render a final ruling on Russia's claims for setting aside or revocation of the arbitral awards.

## **Comment**

The decision confirms that Dutch courts are reluctant to suspend the enforcement of arbitral awards. Further, whether or not an award creditor has taken steps to enforce the award against its counterparty has no influence on the Dutch court's jurisdiction to rule on a request for suspension of the awards.

The decision also provides insight into how the Dutch courts interpret several issues under BITs, such as issues arising in case of annexation of a territory by another country.

Lastly, the decision makes clear that, in the preliminary view of the Court of Appeal in The Hague, Russia's claims to set aside or revoke the arbitral awards filed with the same court are not likely to succeed.

## Case

*Russian Federation v Everest Estate LLC and others (ECLI:NL:GHDHA:2019:1452) (11 June 2019).*

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