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Court	The Hague Court of Appeal
Judgment Date	19-01-2021
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Case number	200.280.055/01
Practice areas	Civil procedure
Particulars	Appeal
Content indication	Claim to annul an arbitral award in which the arbitrators have declined jurisdiction. Claim rejected. Arbitrators' refusal to accept jurisdiction cannot be annulled on the basis of Article 1065 of the Civil Procedure Code.
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Judgment

THE HAGUE COURT OF APPEAL

Civil Law Division

Case number: 200.280.055/01

judgment of 19 January 2021

concerning:

1. [appellant 1],

2. [appellant 2],

3. [appellant 3],

4. [appellant 4],

5. [appellant 5],

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6. [appellant 6],

all residing in [residence],

7. [appellant 7],

residing in [residence],

6. The heirs of [testator], namely: **[heirs],**

all residing in [residence],

claimants,

hereinafter referred to as: [appellants],

advocate: mr. I.M.C.A. Reinders Folmer in Amsterdam,

against:

The Bolivarian Republic of Venezuela,

having its seat in Venezuela,

respondent,

hereinafter referred to as: Republic of Venezuela, did not appear.

Procedural background

1. By summons of 12 March 2020, [appellants] filed an action with the Court of Appeal pursuant to Article 1064a of the Code of Civil Procedure to set aside an arbitral award of 13 December 2019, rendered between [appellants] and the Republic of Venezuela (hereinafter: the Arbitral Award). The summons was served on the Public Prosecutor of the Court of Appeal. On 27 March 2020, the Public Prosecutor's office sent the summons, accompanied by a model form and a Spanish translation, to the Central Authority of the Republic of Venezuela, with a request to serve the summons on the Republic of Venezuela. In addition, by registered letter dated 16 March 2020, the bailiff sent the summons, accompanied by a Spanish translation directly to the Republic of Venezuela at the address stated in the Arbitral Award.
2. The Republic of Venezuela made no appearance. The Republic of Venezuela is a party to the 1965 Hague Service Convention. More than six months have passed from the date when the bailiff sent

the summons to the Republic of Venezuela. This complies with the requirements of Article 15(2) of the 1965 Hague Service Convention in conjunction with Article 10 of the 1965 Act Implementing the Service Convention, such that the Republic of Venezuela can be declared in default.

Factual background

3. Based on the summons and the Arbitral Award, the Court of Appeal is able to establish the following:

a. [appellants] belong to a family originally from the Canary Islands. Some of them moved to Venezuela in the 1950s and 1960s. There, they took over a food distribution company, which they expanded in subsequent years. The family business, of which all the claimants are, or have been, shareholders, comprises several companies and is active in supermarket, catering and real estate businesses.

[Appellants] have both the Venezuelan and the Spanish nationality. Some of them were born in Venezuela, others have adopted Venezuelan nationality over time. However, all of them have also retained the Spanish nationality.

The Republic of Venezuela expropriated the properties of [appellants] in 2010 without paying [appellants] any compensation.

In 1995, the Republic of Venezuela and the Kingdom of Spain concluded a bilateral investment treaty (which, in the English translation of the Spanish original to which the Court of Appeal refers in this judgment is entitled "*Agreement between the Kingdom of Spain and the Republic of Venezuela on the reciprocal promotion and protection of investments*", hereinafter: the Treaty). Article I, paragraph (a) of the Treaty contains the following definition of the term "investor":

"*Any physical person who possesses the nationality of one Contracting Party pursuant to its legislation and makes investments in the territory of the other Contracting Party*."

Article XI of the Treaty contains the following rules on dispute settlement:

"*1. The details of any dispute which may arise between an investor of one Contracting Party and the other Contracting Party concerning the fulfilment by that Party of the obligations established in this Agreement shall be notified in writing by the investor to the Contracting Party receiving the investment. As far as possible, the parties to the dispute shall try to settle their differences by amicable agreement.*

2. *If a dispute cannot be settled in this way within a time limit of six months from the date of the written notification referred to in paragraph 1, it shall be submitted, at the investor's choice:*

(a) to the competent courts of the Contracting Party in whose territory the investment was made, or

(b) to the International Centre for Settlement of Investment Disputes (ICSID) established under the

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Convention on the Settlement of Investment Disputes between States and Nationals of Other States (…), provided that both States parties to this Agreement have acceded to the Convention. If either Contracting Party has not acceded to the Convention, recourse shall be had to the Additional Facility for the administration of conciliation, arbitration and fact-finding procedures by the ICSID secretariat.

3. *If for any reason the arbitral bodies referred to in paragraph 2(b) of this article are not available, or if the two parties so agree, the dispute shall be submitted to an ad hoc court of arbitration established in accordance with the arbitration rules of the United Nations Commission on International Trade Law.*

On 1 June 2015, [appellants] instituted arbitration against the Republic of Venezuela under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The place of arbitration is The Hague. In the arbitration, [appellants] claimed damages of approximately USD 240,000,000 from the Republic of Venezuela for wrongful expropriation. The Republic of Venezuela raised an objection to jurisdiction. Subsequently, the arbitral tribunal decided to first consider the question of its own jurisdiction and to defer the merits of the [appellants'] claims to a following phase of proceedings.

In the Arbitral Award, the arbitral tribunal declared that it lacked jurisdiction to consider the [appellants'] claims.

Arbitral Award

4. The arbitral tribunal's reasoning in the Arbitral Award can be summarised as follows (based on the submitted English translation). The arbitral tribunal first investigated whether, under international law (as referred to in Article XI(4)(b) of the Treaty and Article 31(3)(c) of the Vienna Treaties Convention), dual nationals are entitled, without limitation, to bring claims against one of the States of their nationality before international fora. In the arbitral tribunal's opinion, this was not the case. Subsequently, the arbitral tribunal examined whether this right was included in the Treaty. In doing so, the arbitral tribunal proceeded from the definition of the term "investor" in Article I(1)(a) of the Treaty. In the arbitral tribunal's opinion, this definition does not expressly exclude dual nationals from claiming protection under the Treaty, but also does not expressly include them. With reference to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (Vienna Treaties Convention), the Arbitral Tribunal considered that the definition of investor should be interpreted in its context, including the dispute settlement mechanism of Article XI of the Treaty. Under this dispute resolution scheme, an investor has a choice between litigating before the State court of the State where the investment was made and initiating arbitration. In the event that an investor opts for arbitration, the arbitral tribunal considered that Article XI introduced a certain hierarchy. If both Contracting States are parties of the ICSID Convention, or it is possible to engage the Additional Facility of the ICSID Convention (together referred to by the arbitral tribunal as the "ICSID System"), then an investor should initiate ICSID arbitration. Only if the ICSID system is not "available" can an investor commence arbitration under the UNCITRAL rules, so the arbitral tribunal held.

5. Dual nationals are excluded from arbitration under the ICSID system. This led the arbitral tribunal to conclude that dual nationals were likewise not entitled to initiate Treaty arbitration under the UNCITRAL Rules, even if the UNCITRAL Rules themselves did not oppose this. If legal protection were available dual nationals under the UNCITRAL rules, the term "investor" would have a different meaning

depending on the arbitral forum where the proceedings are brought. In the opinion of the arbitral tribunal, this would be incompatible with the structure of the Treaty, the hierarchy between the two arbitral fora, and the principle that terms must have the same meaning regardless of the arbitral forum where the proceedings are brought. The arbitral tribunal concluded that the Contracting Parties have apparently followed the "absolute principle of no responsibility" under international law. By this principle the arbitral tribunal understands the rule that a person may not sue the State of which he is a national before an international forum.

6. The arbitral tribunal added that even if it were to apply the international law principle of effective nationality, the arbitral tribunal would still lack jurisdiction. Under this principle, a dual national may not bring an action in an international forum against the State of his effective nationality. In the opinion of the arbitral tribunal, the [appellants'] effective nationality ("*dominant nationality*") is the Venezuelan nationality. To this end, the arbitral tribunal considers that [appellants] themselves have not argued that Spanish nationality was their effective nationality, that [appellants] have lived in Venezuela for a long time, have built their family ties there, raised their children there, and have had the centre of their economic activity there, and that some of them were even born in Venezuela.

7. On the basis of the foregoing, the arbitral tribunal concluded that persons of Spanish and Venezuelan nationality such as [appellants], could not rely on the Treaty against Spain and Venezuela, regardless of their effective nationality. But even if such persons could claim protection under the Treaty, they still would only be able to assert such claims against the State of which they do not have the effective nationality. Given that [appellants'] effective nationality was that of Venezuela, they could not, in any case, invoke the Treaty against Venezuela. The arbitral tribunal therefore declared itself without jurisdiction to hear the [appellants'] claims.

[Appellants'] claim

8. [Appellants] demand that the Arbitral Award be set aside, and the Republic of Venezuela be ordered to pay the costs of the proceedings. [Appellants] make two complaints about the Arbitral Award. The first complaint is that the arbitral tribunal ignored essential claims and defences of [appellants], supplemented its own facts and arguments, and issued a surprise decision. This should entail the setting aside of the Arbitral Award on the basis of Article 1065(c) and/or (e) of the Civil Procedure Code. The second complaint is directed against the substance of the Arbitral Award, which [appellants] argue must be subjected to a full review given that a fundamental right is at stake. [Appellants] argue that the arbitral tribunal incorrectly declined jurisdiction, thereby disregarding the fundamental right of access to an impartial and independent arbitral tribunal in a case where no effective legal protection is available before a State court. Therefore, the Arbitral Award must be set aside on the basis of Article 1065(1)(e) of the Civil Procedure Code due to conflict with public order, and/or on the basis of Article 1065(1)(a) of the Civil Procedure Code because the Arbitral Tribunal wrongly declined jurisdiction. In addition, [appellants] argue that the Arbitral Award lacks (valid) reasoning and that, in its decision, the arbitral tribunal omitted crucial elements from the Vienna Treaties Convention and from the parties' debate. The Arbitral Award must therefore also be set aside on the basis of Article 1065(1)(c) and (d)

of the Civil Procedure Code.

The court's assessment

Preliminary observations

9. The place of arbitration is The Hague, such that the Court of Appeal is competent to hear [appellants'] claim on the basis of Article 1064a of the Civil Procedure Code. Based on Article 1073(1) of the Civil Procedure Code, these proceedings are governed by Title 1, Book IV of the Civil Procedure Code.

10. Pursuant to section 1065(1) of the Civil Procedure Code, an arbitral award may be set aside on *inter alia* one of the following grounds:

a. there is no valid arbitration agreement;

b. (...)

c. the arbitral tribunal has not complied with its mandate;

d. the award is (...) not reasoned;

e. the award, or the manner in which it was made, is contrary to public order.

11. It follows from Article 1065(4) of the Civil Procedure Code that failure to comply with the mandate referred to in Article 1065(1)(c) can only lead to the award being set aside if it is serious. Such failure is serious *inter alia* if the arbitral tribunal fails to decide on one or more claims or to address one or more essential defences.

12. In accordance with Article 1057(4)(e) of the Civil Procedure Code, the arbitral tribunal must provide the reasons for its decision. If reasoning is lacking, the arbitral award can be set aside on the basis of Article 1065(1)(d) of the Civil Procedure Code. Where reasons have been given, but provide no possibility to discern any valid explanation for the decision, this is treated as equivalent to a failure to state reasons.

13. An arbitral award is liable to be set aside *inter alia* on account of a violation of public order as referred to in Article 1065(4)(e) of the Civil Procedure Code if the arbitral tribunal has violated due process, or mandatory law of such fundamental character that its observance may not be impeded by restrictions of a procedural nature.

14. The starting point for the application of Article 1065 of the Civil Procedure Code is that the State court must exercise its power to set aside an arbitral award with restraint. The required restraint is related, among other things, to the fact that, because of the public interest in an effectively functioning arbitral procedure, Article 1065 of the Civil Procedure Code proceedings may not be used as a disguised appeal. This is different insofar as the disputed question concerns the existence of a valid arbitration agreement (Article 1065(1)(a) of the Civil Procedure Code) and compliance with due process (in which case the arbitral award is contrary to public order as referred to in Article 1065(1)(e) of the Civil Procedure Code). With respect to those questions, the arbitral award is subject to a full review.

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Complaint 1

15. According to [appellants], the Arbitral Award must be set aside on the basis of Article 1065(1)(c) of the Civil Procedure Code, because the arbitral tribunal did not consider the arguments of the parties with regard to the interpretation of the definition of "investor" in Article I(1)(a) of the Treaty and the significance of the Treaty's *travaux préparatoires* for that interpretation. In doing so, the arbitral tribunal is said to have failed to address essential arguments of the parties.

16. The Court of Appeal does not follow [appellants] in this argument, which is based on an excessively broad application of Article 1065(1)(c) of the Civil Procedure Code. The arbitral tribunal must decide on the claims and essential defences of the parties, but it does not have to deal (separately) with all the arguments put forward by the parties in support thereof. In the present case, based on the debate between the parties concerning the interpretation of the definition of investor, the arbitral tribunal held as follows (paragraph 706 of the Arbitral Award): "*The Parties differ with respect to the interpretation of the concept of "investor" from Article 1(1)(a) of the Treaty. Although it is true that such definition does not expressly exclude the protection of dual nationals from the two States Parties to the Treaty, neither does it expressly include them*". This demonstrates that the arbitral tribunal has taken into account the arguments of the parties with regard to the interpretation of the definition of "investor", and that it has formed an opinion as to whether that definition makes it possible to determine whether dual nationals can rely on the protection of the Treaty. It follows from paragraph 706 that, contrary to what [appellants] had argued, the arbitral tribunal was of the opinion that the ordinary meaning of Article 1(1)(a) of the Treaty is not clear. Consequently, the Arbitral Award complies with what may be required of it under Article 1065(1)(c) of the Civil Procedure Code. The Court of Appeal may not, within the constraints of that provision, engage in a substantive assessment whether the arbitral tribunal's interpretation of the definition of "investor" is correct.

17. Likewise unfounded are the [appellants'] arguments that the arbitral tribunal has violated its mandate by paying insufficient attention to the Treaty's *travaux préparatoires.* In the presentation of the parties' arguments in Chapter VI of the arbitral award, the arbitral tribunal recounted what the parties had stated with regard to the *travaux préparatoires*, and in paragraph 642 of the Arbitral Award, the arbitral tribunal stated that the *travaux préparatoires* can be used as supplementary means of interpretation under Article 32 of the Vienna Treaties Convention. Subsequently, the arbitral tribunal found, in paragraph 706 of the Arbitral Award, that the definition of "investor" neither expressly includes, nor expressly excludes, dual nationals (see quote above). This finding appears under the heading "*5. Interpretation of the terms of the Treaty in accordance with the VCLT*". Clearly, the arbitral tribunal has concluded that in this case it was neither necessary nor useful to expressly include the *travaux préparatoires* in the interpretation of Article 1(1)(a) of the Treaty. The Court of Appeal may not engage in a substantive assessment of the question whether that conclusion is correct.

18. [Appellants] further argue that the arbitral tribunal has acted *ultra petita* (and thus violated its mandate) by *inter alia* basing its decision on a part of the *travaux préparatoires* of the ICSID Convention and the "absolute principle of non-responsibility", which was allegedly never raised by

either party. The arbitral tribunal is thus alleged to have unlawfully supplemented the parties' arguments. This argument too is not followed by the Court of Appeal. The arbitral tribunal was free to consider the *travaux préparatoires* of the ICSID Convention when discussing the question whether an "absolute principle of non-responsibility" under international law exists, and to then take that principle into account in its judgment. The legal grounds in question are such as could be independently engaged by the arbitral tribunal in its analysis. The principle of due process does not imply an obligation for the arbitral tribunal to enable the parties to comment in advance on its intended legal reasoning. Incidentally, the Republic of Venezuela did raise the *travaux préparatoires* of the ICSID Convention in the arbitration (see opinion of Professor A. Pellet submitted in the arbitration by the Republic of Venezuela; Professor Pellet discusses this point extensively in paragraph 6 *et seq* of his opinion). In his opinion, Professor Pellet also refers to the "absolute principle of non-responsibility", or its codification in Article 4 of the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* (see paragraphs 43 and 50 of his opinion). Thus, both the *travaux préparatoires* of the ICSID Convention and the "absolute principle of non-responsibility" have, in fact, been discussed in the arbitration. This is provides an additional reason why this is not a case of a surprise decision.

19. For these reasons, complaint 1 fails.

Complaint 2

20. Pursuant to Article 1065(1)(a) of the Civil Procedure Code, an arbitral award may be set aside if there is no valid arbitration agreement. This provision implies that the (State) court ultimately has the final say on whether or not a valid arbitration agreement has been concluded. The answer to this question falls within the domain of the court given the fundamental nature of the right of access to justice. The court can set aside an arbitral award if an arbitral tribunal has wrongly assumed jurisdiction. By contrast, the law does not provide the court with the power to set aside an arbitral award by which an arbitration tribunal has declined jurisdiction based on the absence of a valid arbitration agreement. If an arbitral tribunal has, on that basis, declared that lacks jurisdiction the court may hear the case based on Article 1052(5) of the Civil Procedure Code. The right of access to justice is not at stake here. Examination by the court of an arbitral award in which an arbitral tribunal has declared itself without jurisdiction is also not compatible with the principle laid down in Article 1052(1) of the Civil Procedure Code according to which the arbitral tribunal is entitled to decide on its own jurisdiction.

21. [Appellants] argue that in the context of investor protection under international investment treaties such as the Treaty, the starting point should not be the right of access to a court, but the right of access to an (impartial and independent) arbitral tribunal. According to [appellants], in that context, arbitration is "*not a useful alternative, but, rather, a necessary substitute*" for State courts, which do not provide investors with an effective legal remedy to enforce their rights against contracting States. That is said to apply with greater force to the case of Venezuela, where the rule of law is not functioning. In addition, according to [appellants], the so-called "*fork in the road*" principle means that once an investor has opted for arbitration, it loses access to Venezuelan courts. This principle is said to follow from Article XI(2) of the Treaty, which gives the investor a choice between Venezuelan courts and arbitration; once it has opted for arbitration, the path to Venezuelan courts is foreclosed, even if the arbitral tribunal subsequently declines jurisdiction. The consequence of the Arbitral Award is

therefore that [appellants] no longer have any legal and factual possibility to enforce their claims against the Republic of Venezuela. According to [appellants], this was disregarded by the arbitral tribunal when it declined jurisdiction.

22. The Court of Appeal rejects this argument, which is not compatible with Article 1065(1)(a) in conjunction with Article 1052 of the Civil Procedure Code. As in paragraph 20 above, the basic premiss of these Articles is that the arbitral tribunal rules on its own jurisdiction and that the court may verify whether an arbitral tribunal has based its jurisdiction on a valid arbitration agreement. This cannot be reconciled with the court engaging in a substantive assessment of the arbitral tribunal's judgment that it lacks jurisdiction and setting aside that judgment if it arrives at a different conclusion than the arbitral tribunal. This is no different in the context of international investment arbitrations. Article 1065(1)(a) and Article 1052 of the Civil Procedure Code apply to arbitration agreements in general, regardless of the context. The Court of Appeal therefore sees no grounds for a review of the arbitral tribunal's finding that it lacked jurisdiction under Article 1065(1)(a) of the Civil Procedure Code.

23. Nor does the Court of Appeal follow [appellants] in their argument that the Arbitral Award is contrary to public order because it prevents [appellants] from enforcing their rights against the Republic of Venezuela. The (Dutch) public order does not require the court to ensure access to an arbitral tribunal in the context of international investment arbitrations and to set aside any decision of an arbitral tribunal by which it declines jurisdiction, quite apart from the fact that it is unclear what a setting aside of the arbitral tribunal's decision might contribute in that regard. Such setting aside would not automatically result in a restauration of the arbitral tribunal's jurisdiction. After all, it is up to the arbitral tribunal to assume jurisdiction and it is not bound by the judgment of the court in that respect. This is no different if the (State) courts of the contracting State do not provide effective legal protection. The [appellants'] position boils down to stating that the Court of Appeal, as the court of the place of arbitration, ought to form an opinion on the quality of the legal protection in the contracting State and, depending on that opinion, should set aside an arbitral award by which the arbitral tribunal declined jurisdiction. This goes beyond the judicial review of arbitral awards under Article 1065 of the Civil Procedure Code. Incidentally, the Court of Appeal cannot see how the Arbitral Award has cut off access to court based on the "*fork in the road*" principle referred to by [appellants]. The arbitral tribunal has declined jurisdiction because [appellants] are not "investors" within the meaning of the Treaty, such that there is no valid arbitration agreement with regard to their claim. In other words, the possibility of arbitration agreed by the Contracting States does not apply to [appellants'] claim. Against this background, it is implausible that the Treaty opposes [appellants] submitting that claim to a court. This could be the Venezuelan court, or the court in another country with jurisdiction to hear a claim by [appellants] against the Republic of Venezuela.

24. [Appellants] reliance on article 1065(1)(d) of the Civil Procedure Code is also unavailing. The Arbitral Award contains extensive reasoning. That reasoning is not so incomprehensible as to lack any legitimate explanation for the decision. Article 1065(1)(d) of the Civil Procedure Code leaves no scope for a substantive assessment of the reasoning. Finally, the Court of Appeal rejects the [appellants'] assertion that the arbitral tribunal violated its mandate by omitting crucial elements from the Vienna Treaties Convention and the debate between the parties in its judgment. This is covered by the Court of Appeal's considerations above in response to the first complaint (see paragraph 16). The debate between the parties concerned the interpretation of the definition of "investor". The arbitral tribunal paid extensive attention to this, taking into account the

interpretation rules from the Vienna Treaties Convention (see paragraphs 705 *et seq* of the Arbitral Award, as well as paragraph 739). The arbitral tribunal also explained why it started its analysis with a statement on international law: it follows from both Article 31(3)(c) of the Vienna Treaties Convention and from Article XI(4)(b) of the Treaty that the arbitrators must take international law into account when interpreting the Treaty. The arbitral tribunal further considered that Contracting States have the power to derogate from the applicable international law in the Treaty, but that this requires *clear language* (paragraphs 644 to 647 of the Arbitral Award). Nothing in this approach indicates that the arbitral tribunal has violated its mandate. The mere circumstance that the arbitral tribunal could possibly also have reached a different conclusion (one that [appellants] consider correct) is not enough for a finding of a ground for set-aside under Article 1065 of the Civil Procedure Code.

25. Consequently, the [appellants'] claim to set aside the Arbitral Award is rejected. [Appellants] are ordered to pay the costs of the proceedings, which are assessed as nil for the Republic of Venezuela, given that the Republic of Venezuela has not made an appearance in the proceedings.

The decision

The Court of Appeal:

- rejects the [appellants'] claim to set aside the Arbitral Award;

- orders [appellants] to pay the costs of the proceedings, which are assessed as nil for the Republic of Venezuela.

This judgment was given by mrs. P. Glazener, C.A. Joustra and R.M. Hermans, and was pronounced in open court on 19 January 2021 with the attendance of the registrar.