School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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REPUBLIC OF ECUADOR
V.
CHEVRON CORPORATION (USA) AND TEXACO PETROLEUM COMPANY
(DISTRICT COURT OF THE HAGUE)
JUDGMENT ON REQUEST TO SET ASIDE ARBITRAL AWARDS

Case Report by Elis Wendpap**
Edited by Ignacio Torterola ***

Judgment of May 2, 2012 rejecting Ecuador's request to set aside three awards rendered by the Arbitral Tribunal – the interim award on jurisdiction, the partial award that found Ecuador in breach of the BIT, and the final award that stipulated the amount of compensation.

Main Issues:	Set aside – valid arbitration agreement; Set aside – lack of reasons; Set aside – tribunal's mandate
Tribunal:	District Court of The Hague, the Netherlands. Mr. H. Wien, Mr. F.M. Bus, and Mr. M.J. van Cleef-Metsaars.
Claimant's Counsel:	Mr. G.W. van der Bend.
Defendants' Counsel:	Mr. J.M.K.P. Cornegoor.

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Digest

1. Facts of the Case

Chevron Corporation ("Chevron") is an indirect shareholder of Texaco Petroleum Company ("TexPet"). TexPet had a Concession Agreement with the Republic of Ecuador ("Ecuador") from 1964 to 1992 for the extraction and exploration of oil in the Ecuadorian Amazon. In 1995, Ecuador and TexPet concluded the Global Settlement Agreement and Release, concerning the termination and settlement of the Concession Agreement.

From 1991 to 1993 TexPet litigated against Ecuador in seven different procedures before the Ecuadorian courts claimed several breaches of the Concession Agreement. In 1993, the United States and Ecuador concluded the Bilateral Investment Treaty ("BIT"), which came into force in 1997.

Then in 2006, Chevron initiated an arbitral procedure against Ecuador based on the arbitration agreement provided for in Article VI of the BIT, with seat in the Netherlands. Chevron alleged (among other issues) that there was an undue delay in the settlement of the seven litigations by the Ecuadorian courts, amounting to a breach of Article II(7) of the BIT that states "[e]*ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment* […]".

The Arbitral Tribunal rendered three awards in the case: (i) the interim award of December 1, 2008 declaring its competence to decide the dispute; (ii) the partial final award of March 30, 2010 accepting Chevron allegations that there was a denial of justice because of the undue delay; and (iii) the final award, that set compensation for Chevron of USD 96,355,369.17 (including interest).

Ecuador initiated two setting aside procedures before the District Court of The Hague, one challenging the interim and the partial awards, and the second challenging the final award. The two procedures were consolidated once both refer to the same arbitral proceedings.

In the requests to set aside the awards, Ecuador claimed that there was not a valid arbitral agreement in the case, and therefore the Arbitral Tribunal was not competent to decide the dispute (article 1065, paragraph 1 sub a, of the Code of Civil Procedure). Moreover, the Tribunal would have infringed its mandate by not fully analyzing Ecuador's defense. For this reason, the awards should be set aside because they could not be considered as reasoned decisions (article 1065, paragraph 1 sub c and d, of the Code of Civil Procedure).

2. *Legal Issues Discussed in the Decision*

(a) Article 1065, paragraph 1 sub a, of the Code of Civil Procedure (¶¶4.5, 4.8-4.13)

The District Court highlighted that the setting aside procedure is not an instrument of appeal, and that a court could only set aside arbitral awards in significant cases.

The ground for set aside established in article 1065, paragraph 1 sub a, of the Code of Civil Procedure encompass whether there is evidence of a valid arbitration agreement and, thus, if "*the parties are not prevented from approaching the court that the law allows them to approach*" (¶4.5).

Ecuador sustained that the validity of the arbitration agreement in the BIT could not be disassociated from the terms of Article XII (1) of the BIT, which states that "[t]*his Treaty* […] *shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter* […]". The temporal limitation would affect Chevron's claims because the Concession Agreement (the investment) was ended in 1992, while the BIT entered into force only in 1997, and Chevron's request referred exclusively the seven legal proceedings initiated after the conclusion of the investment.

Chevron, by the other hand, defended that the Arbitral Tribunal was competent within the criteria of the BIT, which would include the temporal limits. These would be part of the "material" aspect of the arbitration agreement and would not affect its validity, falling outside the District Court's review power.

The District Court found that Ecuador never questioned the existence of an investment or of a dispute arisen out of this investment. "*The conditions for the dispute to be settled through the Arbitration Tribunal as prescribed in Article IV are therefore met*" (¶4.10). The Code of Civil Procedure does not extend the court's jurisdiction to read the arbitration agreement in combination with other provisions of the BIT, mainly because it is different to analyze whether the Arbitral Tribunal has jurisdiction over the dispute than to verify if this jurisdiction extends over an investment ended before the existence of the arbitration agreement. The latter concerns the Tribunal's "*opinion about the scope of protection of the BIT*" (¶4.11), and thus not subjected to full review by the District Court.

The District Court concluded that there was evidence of a valid arbitration agreement, and Ecuador's request to set aside the awards under article 1065, paragraph 1 sub a, of the Code of Civil Procedure was rejected.

(b) Article 1065, paragraph 1 sub c and d, of the Code of Civil Procedure (¶¶4.6-4.7, 4.14-4.28)

The District Court pointed out that, according the provisions of the Code of Civil Procedure, it does not have competence to review the content of an award for alleged unsound reasoning, but solely for the absence of reasoning. Besides, "*the lack of reasoning is considered to be on a par with the case that a reason is indeed given but that within that reason any well-founded explanation for the relevant judgment cannot be recognized*" (¶4.6).

Ecuador requested the award be set aside because the Arbitral Tribunal would not have fully considered Ecuador's arguments and, thus, failed to adhere to its mandate. Moreover, Ecuador alleged the Tribunal "*acted outside of the legal dispute between the parties with regard to the* loss of chance *principle*" and "*has incorrectly failed to apply customary law*" (¶4.15).

i. Whether the Tribunal failed to make a (reasoned) decision on Ecuador's defenses

Regarding all the defenses listed by Ecuador that would not have been duly analyzed in the awards, the District Court decided that the awards have to have properly considered them, some with deeper analysis than the others. The judgment indicated the paragraphs of the awards that dealt with Ecuador's claims, sustaining that the Arbitral Tribunal did consider the defenses and rejected them.

One of the points raised by Ecuador was the content of two decisions rendered by Ecuadorian courts during the arbitral procedure. These decisions considered the causality questions and the extension of damages, and would relate to Ecuador's defense of the loss of chance principle. Ecuador claimed that the Arbitral Tribunal could not render a decision on these matters without considering the approach taken by the domestic courts.

The District Court concluded that the Arbitral Tribunal verified those arguments when analyzing the "undue delay" issue and the breach of Article II(7) of the BIT. "*In doing so it is considered that this breach was already definite on the day that the arbitration procedure was brought before the court*"(¶4.21). For the purpose of the arbitration, any decision rendered after the commencement of the procedures did not remedy the breach. In addition, the District Court found that the there was no evident failure by the Tribunal to appreciate the "loss of chance" claim.

For those reasons, the District Court decided there was no evidence that the awards had an unsound reasoning that could be considered as lack of reasoning.

ii. Whether the Tribunal acted outside of the legal dispute with regard to the loss of chance principle

The District Court indicated that the paragraph of the partial award were the Arbitral Tribunal expressly stated that the loss of chance principle did not apply to the case. Thus, "[t]*he court does not see in which way the Arbitral Tribunal in doing so has acted outside of the legal dispute between the parties*"(¶4.26).

iii. Whether the Tribunal correctly applied customary law

The judgment considered that the approach taken by the Arbitral Tribunal was sufficient to demonstrate that Ecuador's argument on customary law was properly dealt with. The Arbitral Tribunal compared the BIT with the international law criterion of the denial of justice to reach a conclusion. Besides, the fact that a different conclusion could be possible by the application of customary law does not amount to disregard Ecuador's claims. Consequently, there were no ground to set aside any of the awards.

3. Decision

The District Court denied both of Ecuador's demands to set aside the awards since none of the legal grounds established by the Code of Civil Procedure were met. Namely, there was a valid arbitration agreement, the Tribunal acted within its mandate, and the three awards were reasoned.