RULING FROM THE HAGUE COURT OF APPEAL, 29 JUNE 2021 (GEMEENTEN V. ATTERO)

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I. SUMMARY OF THE CASE

The judgment at hand[1] rules on two consecutive arbitration proceedings. Both arbitrations concerned disputes between Attero, a waste processing company, and certain Dutch counties and municipalities. The parties had entered into a supply agreement, which included an addendum with provisions on applicable tariffs in case of reduced waste supply (the *Tarievenmodel*). Following a period of reduced supply by the counties and municipalities among the years 2011 to 2014, Attero claimed in the first arbitration that

1. Ruling from The Hague Court of Appeal, 29 June 2021 (Gemeenten v. Attero), ref. ECLI:NL:GHDHA:2021:1119, available in the Dutch original at deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2021:1119 (last accessed 18 January 2022).

it was entitled to supplementary compensation based on Art. III (1) of the *Tarievenmodel*. The first tribunal disagreed with Attero's interpretation of the relevant provisions and dismissed its claims.

In the second arbitration, Attero pursued the same claim against the counties and municipalities, but only in respect of reduced supply in the years 2015 to (January) 2017. In this second case, a different tribunal agreed with Attero's interpretation of Art. III (1) and awarded Attero's claim.

In the setting aside proceedings before the Court of Appeal of The Hague that followed, the counties and municipalities argued that the second set of arbitral awards violated the *res judicata* effect of the first set of arbitral awards rendered.

The *res judicata* effect of arbitral awards is governed by Art. 1059 of the Dutch Code of Civil Procedure (DCCP), which provides amongst others that «decisions concerning the legal relationship in dispute and contained in an arbitral award in relation to which ordinary means of recourse are no longer available shall have res judicata effect in other proceedings between the same parties». It is a provision of mandatory procedural law. When invoked, tribunals and courts must apply this rule and assess whether an issue in dispute between the parties has already (in whole or in part) been decided in a previous award or judgment between the same parties. If this is the case, the previous decision must be adhered to. No conflicting decision may be rendered.

According to the counties and municipalities the second arbitral tribunal rendered a decision about the interpretation of a contractual provision that was different from, and conflicting with, a decision on that same issue by the first arbitral tribunal. That first decision had *res judicata* effect and, hence, the second (conflicting) decision, was rendered in violation of Art. 1059(1) DCCP. They therefore applied for the setting aside of the second set of arbitral awards, inter alia on grounds of breach of mandate in accordance with Art. 1065(1)(c) of DCCP («an award may only be set aside on one or more of the following grounds: (c) the arbitral tribunal did not comply with its mandate»).

In its decision on the setting aside application, the Court of Appeal of The Hague provides a useful overview of the applicable standard of review considering that a breach of mandate may indeed arise from non-observance of applicable procedural rules, including the *res judicata* principle laid down in Art. 1059 DCCP. The term «decisions» as included in said provision, covers not only decisions contained in the operative part of the award, but also decisions that are (wholly or partly) supportive to the operative part of the award. Such decisions are also binding in subsequent proceedings.

The Court stresses that observance of Art. 1059 DCCP is significant, as it prevents parties from subjecting a point of dispute which has already been bindingly decided to a second review in subsequent proceedings, while it also prevents conflicting decisions.

In accordance with Supreme Court case law, the Court confirms that it is to exercise restraint in its review of the arbitral awards. The Court therefore considers that it may only intervene in this case if (i) the reasoning of the second arbitral tribunal about the *res judicata* effect of the first awards is wrong, and (ii) the point in dispute in question is significant. The Court subsequently performs a detailed, substantive, review of both the first and second sets of arbitral awards. It specifically scrutinizes the second arbitral tribunal's conclusions on the (lack of) *res judicata* effect of the decisions in the first set of arbitral awards. The second arbitral tribunal had decided that the interpretation of the relevant contractual provision was not a matter in dispute in the first arbitration. To assess whether the second arbitral tribunal was correct, the Court not only reviews the submissions from the first arbitration, but also reviews the pleadings of the parties in the setting aside proceedings that followed the *first* set of arbitral awards.

The Court concludes that the interpretation of the contractual clause in dispute had been fundamental to the first arbitral tribunal's decision, and that the second arbitral tribunal's decision, based on a conflicting interpretation is therefore unmistakably wrong and sufficiently serious to warrant intervention by the Court by way of setting aside the second set of arbitral awards.[2]

II. COMMENTARY

A couple of interesting points arise from this decision from the Court of Appeal of The Hague. First, the «restraint» that is to be exercised in setting aside proceedings in accordance with Dutch law did not prevent the Court in this case from substantively and thoroughly assessing the facts underlying the challenged arbitral awards, as well as the previous awards and the parties' submissions leading up to, and following, these awards. The Court was prepared to perform a material review to assess whether the second set of awards was indeed the result of a breach of mandate by way of violation of *res judicata*. The standard of «restraint» in setting aside proceedings hence seems to be a more procedural standard, rather than directing setting aside courts to exercise restraint in factually reviewing the file before them.

2. Attero has since lodged an appeal in cassation against the judgment of the Court of Appeal of The Hague with the Supreme Court. At the time of writing this commentary, the cassation proceedings were still pending.

Second, the Court dismissed Attero's defence that, in accordance with Art. 1065(4) DCCP,[3] the counties and municipalities forfeited their right to complain about breach of mandate because they failed to specifically raise complaints about a breach of mandate in the second arbitration. The Court considers it irrelevant whether the counties and municipalities labeled their *res judicata* defence in the second proceedings explicitly as a breach of mandate in the sense of Art. 1065(1)(c) DCCP and considers that it suffices that they objected, clearly and in a substantiated manner, against a violation of *res judicata*.

This decision seems to affirm earlier case law on the topic of Art. 1065(4) DCCP. For example, in the *Tiffany v. Swatch* case decided in first instance in 2015,[4] the Amsterdam Court of First Instance was asked to consider whether the tribunal breached its mandate by failing to observe a contractual limitation to its mandate. One of the arguments relied on by Swatch against Tiffany's setting aside request was that Tiffany had failed to raise a breach of mandate defence in the arbitration (on grounds of Art. 1065(4) DCCP). Interestingly, the tribunal had explicitly recognized the contractual limitation in question. Tiffany argued that as a result, it did not foresee the tribunal breaching its mandate and consequently did not raise any such defence with a specific reference to any of the setting aside grounds included in Art. 1065(1) DCCP. The Court considered that it was sufficient that Tiffany had relied on the contractual limitation in question in the arbitration and set aside the award on grounds of breach of mandate. This decision was overruled by the Amsterdam Court of Appeal, without a discussion on the question of whether Tiffany's setting aside request was barred by Art. 1065(4) DCCP. Nonetheless, to prevent counterparties from invoking Art. 1065(4) DCCP in setting aside proceedings, parties should be aware of the need to address circumstances that may cause future awards to be vulnerable to settings aside claims. As Art. 1065(4) DCCP aims to prevent parties from «keeping their cards to their chest», parties better explicate any objections they may have, already in the arbitral proceedings.

3. Art. 1065(4) DCCP provides that «the ground referred to in paragraph (1)(c) shall not constitute a ground for setting aside if the deviation from the mandate is not of a serious nature. Nor shall the ground referred to in (1)(c) constitute a ground for setting aside if the party advancing this ground has failed to make an objection in the matter in accordance with Art. 1048a».
4. Ruling of the Amsterdam Court of First Instance, 4 March 2015 (Tiffany v. Swatch), ref. ECLI:NL:RBAMS:2015:1181.