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Asymmetrical Avenues for Annulment – The Continuing Controversy over the Setting Aside of Negative Jurisdictional Decisions

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Under Article 34 of the UNCITRAL Model Law ("Model Law"), an arbitral award may be set aside if the arbitration agreement is "*not valid*". A more controversial issue is whether setting aside avenues should also be available in the opposite scenario, *i.e.*, when a tribunal found that no valid arbitration agreement existed and declined jurisdiction. Although it has been argued that denying parties this possibility results in "*grave unfairness and inefficiency*" (Gary Born, *International Commercial Arbitration* (3rd ed. 2021) p. 1193), this is precisely the approach recently endorsed by the Dutch Supreme Court. In this blogpost, we explain why.

The Supreme Court's judgment concerned the decision rendered by an UNCITRAL tribunal in the case of *Manuel Garcia Armas et al. v. Venezuela*. The tribunal had declined jurisdiction on the grounds that the applicable BIT did not allow claims by dual nationals, an issue that has caused some controversy (*see, e.g.*, here and here). In a recent judgment in a different case, the District Court of The Hague dismissed the argument that the investor's dual nationality precluded the existence of a valid arbitration argument. By contrast, in the case of *Manuel Garcia Armas et al.*, the issue was not assessed in depth by the Dutch courts, because they found that a negative jurisdictional decision cannot be subject to setting aside proceedings in the Netherlands.

Intricacies of Dutch Civil Procedure

Article 1065(1)(a) of the Dutch Code of Civil Procedure ("DCCP") is similar to Article 34(2)(a)(1) of the Model Law in the sense that its wording appears to limit the possibility of annulment to the scenario where the tribunal has found that a valid arbitration agreement exists. This is different, for instance, in France and Switzerland, where the law provides that an international arbitral award may be set aside "where the arbitral tribunal wrongly accepted or declined jurisdiction".

The debate before the Dutch Supreme Court focused not only on the wording of Article 1065 DCCP but also on an apparent inconsistency between several other provisions of the DCCP. One of these provisions (Article 1052(6)) stipulates that an arbitral decision declining jurisdiction qualifies as an award to which the DCCP's sections on arbitral awards apply, including (apparently) the provisions on setting aside. Nevertheless, according to the Dutch Supreme Court,

the legislative history of Article 1052 demonstrated that the legislator had considered but rejected the possibility of allowing the setting aside of negative jurisdictional decisions. Article 1052(6) merely served to clarify that a respondent who successfully contested jurisdiction should be able to enforce a cost order in the same manner as a final award.

Underlying Policy Considerations

The Supreme Court's judgment did not explicitly address more principled considerations that may be relevant, also in other jurisdictions, to the question of whether a negative jurisdictional award should be capable of annulment. Several of such arguments can be found in the judgment of the Court of Appeal and in the opinion of Advocate-General Drijber issued in the same case. One consideration, which is also mentioned in the drafting history of the Model Law, holds that it would be 'inappropriate' to compel a tribunal to rule on the merits of the case after it had declined jurisdiction. It is doubtful whether this point can be conclusive on its own. To the extent a tribunal would have any difficulty with a continuation of the proceedings after the annulment of its initial jurisdictional decision, this situation could in principle be remedied through the constitution of a new tribunal (comp. Rule 74(1) of the ICSID Arbitration Rules).

On a more fundamental level, the Advocate-General argued that the principle of *Kompetenz-Kompetenz* grants the tribunal the 'primary' authority to rule on its own jurisdiction, which would preclude the setting aside of a negative jurisdictional decision. This point raises questions as well. Even assuming that the principle of *Kompetenz-Kompetenz* has any bearing on the authority of the annulment judge to review arbitral decisions on jurisdiction, the principle could be said to oppose the review of positive jurisdictional decisions as well as negative ones. The principle of finality, from which the Advocate-General deduced that a tribunal's decision to decline jurisdiction should be final, could be interpreted in the same manner.

Along these lines, the main argument in favour of allowing the annulment of negative jurisdictional decisions is that parties to an arbitration should have equal access to setting aside proceedings. Refusing the annulment of negative jurisdictional determinations results in an asymmetry: whilst an arbitral decision accepting jurisdiction is subject to *de novo* review insofar the existence of the arbitration agreement is disputed, an arbitral decision declining jurisdiction cannot be annulled on the ground that a valid agreement does in fact exist.

The Court of Appeal and Advocate-General, however, drew a distinction between the two scenarios. They noted that an exercise of arbitral jurisdiction requires a waiver of the fundamental right to access to state courts, and that state courts should therefore have the ultimate authority to determine whether the conditions for such a waiver have been met. When a tribunal declines jurisdiction, by contrast, the right to access to court is not at issue – on the contrary, such a decision maintains the jurisdiction of the state courts.

What If Arbitration is the Only Available Avenue?

Manuel Garcia Armas et al. had argued that the Dutch courts' refusal to reconsider whether an arbitration agreement existed, deprived them of any meaningful remedy against the measures taken by the host state. According to the investors, the protection provided by international investment

treaties depends on access to an impartial and independent international tribunal, especially when state courts cannot be considered sufficiently reliable to provide the required protection. Moreover, in the context of investment arbitration, a categorical refusal to subject negative jurisdictional decisions to setting aside proceedings would systematically favour the position of the respondent state.

A perceived insufficiency of state court jurisdiction can also arise in international commercial disputes. In such circumstances, it is often not immediately clear which state court should have jurisdiction, and a court judgment may also be more difficult to enforce than an arbitral award (Born, op. cit., p. 1195-96). For such reasons, the argument that a negative jurisdictional ruling 'merely' refers the parties to the state courts may not be as persuasive in an international context as it may be in the domestic context.

In the case of *Manuel Garcia Armas et al.*, the Court of Appeal and the Advocate-General dismissed this point, noting that the Dutch courts do not have a duty to guarantee access to international arbitration, nor a duty to assess the quality of the protection offered by state courts in other jurisdictions.

Continued Controversy or Future Convergence?

The approach taken by the Dutch Supreme Court is not unique. The German Supreme Court, for instance, reached a similar outcome in a controversial decision of 2002 (*see* for a comment here). At the same time, the asymmetrical approach may be losing ground (*see* here about the policy change effectuated in Singapore in 2012). It has been said to reflect an "*archaic rationale … badly out of step with … international developments over the past several decades*" (Born, op. cit., p. 1195).

In the Netherlands, the Advocate-General also expressed some sympathy for the argument that access to annulment proceedings should be symmetrical, and he noted that legislative change may go this way in the future. Nonetheless, in his view, this decision should be made by the legislator and not by the courts. For now, the Supreme Court has made clear that negative jurisdictional decisions cannot be set aside in the Netherlands, at least not on the ground that a valid arbitration agreement existed. It has been suggested that the Supreme Court may have been motivated by a desire to limit the number of setting aside proceedings in the Netherlands as these impose heavy burdens on the Dutch judiciary. If this was indeed the Supreme Court's thinking, the judgment will probably meet its goal (although the number of setting aside proceedings challenging negative jurisdictional decisions was probably limited already).

Meanwhile, Manuel Garcia Armas et al. have brought a complaint against the Netherlands before the European Court of Human Rights (ECtHR), arguing that the asymmetrical access to annulment violates their right to access to justice as well as the anti-discrimination provisions of the European Convention on Human Rights (ECHR). Part of this claim (*see* for a defence here) had been assessed and rejected by the Advocate-General, who concluded that the ECHR does not guarantee a right of access to arbitration nor a right to legal remedies not foreseen by law.

Unless the ECtHR finds that the asymmetry of annulment avenues available under Dutch law violates the obligations of the Netherlands under the ECHR, parties who choose a Dutch seat should be aware that a tribunal's decision to decline jurisdiction for lack of a valid arbitration

agreement is final and not subject to annulment.

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