FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16

JUDGMENT OF 3 JUNE 2020

REFERRAL FOLLOWING COURT OF CASSATION'S JUDGMENT
SETTING ASIDE OF AN ARBITRAL AWARD

(No 25/2020, 9 pages)

General Directory Entry Number **: RG 19/03588 No Portalis 35L7-V-B7D-B7KIR**

Decision referred to the Court: Arbitral award handed down on 15 December 2014 by the arbitral tribunal composed of Professor X, Chairman, and of Mr. T. and Mr. O, arbitrators, under the aegis of the Permanent Court of Arbitration (PCA No) and upon an appeal decision dated 13 February 2019 of the Paris Court of appeal's judgment dated 25 April 2017 (RG n°15/01040 1-1)

CLAIMANT:

Bolivarian Republic of Venezuela
Having its domicile : Av. Los Illustres, cruce con calle Francisco Lazo Martí (VENEZUELA)
Represented by Procurador General de la República, having its offices : Procuraduría General de la República, piso 8, Urb. Santa Mónica, Caracas 1040 (VENEZUELA)

Represented by..., member of the Paris Bar : […]

RESPONDENTS:

Mr. G.
Having his domicile : […]
&
Ms. G.
Having her domicile : […]

Represented by..., member of the Paris Bar : […]

COURT COMPOSITION

The case was heard on 28 January 2020 in open court, before the Court composed of:

Anne BEAUVOIS, President
Fabienne SCHALLER, Judge
Laure ALDEBERT, Judge

who ruled on the case, a report was presented at the hearing by Fabienne SCHALLER in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: Clémentine GLEMET

JUDGMENT

- adversarial
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by Anne BEAUVOIS, President and by Clémentine GLEMET, Clerk to whom the original was delivered by the signatory judge.

I- STATEMENT OF FACTS AND PROCEDURE

1. Mr. G and his daughter Ms. G (hereinafter " Mr. and Ms. G. "), acquired in 2001 and 2006 shares in two Venezuelan companies of the food sector, T. and A.

2. In 2010, the Venezuelan administrative authorities carried out checks on these companies with regard to the regulations applicable to this sector of activity and took sanctions against them.

3. Relying on the Bilateral Treaty for the protection of Hispano-Venezuelan Investments of 2 November 1995 (hereinafter referred to as "the BIT" or "ARPPI"), Mr. and Ms. G. initiated arbitration proceedings in early October 2012 under the arbitration rules of the United Nations Commission on International Trade Law of 15 December 1976 (UNCITRAL) registered with the Permanent Court of Arbitration in The Hague.

4. They claimed that, as a result of the confiscation and detention measures taken by the Venezuelan authorities against the two companies in which they had invested, they had suffered damage for which they were seeking compensation under the BIT, the protection of which they invoked in their capacity as Spanish nationals.

5. The Bolivarian Republic of Venezuela (hereinafter "Venezuela") raised the lack of jurisdiction of the arbitral tribunal on the ground that Mr. and Ms. G. could not benefit from the protection of the BIT, since the BIT was inapplicable both with respect to the dual nationality of Mr. and Ms. G. and with respect to their late acquisition of Spanish nationality.

6. In an award handed down in Paris on 15 December 2014, the arbitral tribunal composed of O, T and X, Chairman:
- held that the Claimants are "investors" and the investments made by them are investments under the terms of Article I of the Treaty,
- dismissed the plea of lack of jurisdiction submitted by the Bolivarian Republic of Venezuela,
- held that this Tribunal has jurisdiction to deal with these proceedings and to settle the dispute between the Parties in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of 15 December 1976 and the Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (ARPPI).

7. On 14 January 2015, Venezuela brought an action to set aside this award.

8. On 25 April 2017, the Paris Court of Appeal setted aside the award partially on the basis of Article 1520, 1° of the Code of Civil Procedure, "only in so far as it holds that the disputed assets

are investments within the meaning of the Treaty, regardless of the nationality of the investors at the date on which they made their investments". For the rest, the Court of Appeal granted exequatur to the award .

9. Following an appeal brought by Venezuela on 11 September 2017, the Court of Cassation, in a ruling of 13 February 2019, overturned and annulled the appeal in its entirety and referred the case back to the Paris Court of Appeal, composed differently.

10. On 15 February 2019, Venezuela appealed to the Paris Court of Appeal following the decision of the Supreme Court.

11. The case was registered under No. RG 19/3588 and was redirected to the ICCP-CA on 15 March 2019, with a hearing scheduled for 28 January 2020.

12. The case management procedure was closed on 7 January 2020.

II- CLAIMS OF THE PARTIES

13. According to its latest submissions notified on 2 January 2020 by "RPVA", Venezuela requests the Court, under Articles 1466, 1519, 1520-1o, 1520-3o, 1520-4o and 1520-5o of the Code of Civil Procedure, to find its appeal admissible, to set aside the opposing legal exhibits J98 to J141, to set aside the award undertaken and to order Mr. and Ms. G. to pay the sum of 200,000 euros under Article 700 of the Code of Civil Procedure.

14. According to their latest submissions notified on 6 January 2020 by "RPVA", Mr. and Ms. G. request the Court, under Articles 1504 et seq., 699 and 700 of the Code of Civil Procedure, to find Venezuela's pleas inadmissible and at the very least with no merits, dismiss Venezuela's action for setting aside the arbitral award, grant exequatur to the arbitral award ruling on jurisdiction made on 15 December 2014 and order Venezuela to pay them the sum of 200,000 euros under Article 700 of the Code of Civil Procedure.

15. The Court refers, for a fuller statement of the facts, claims and pleas of the parties, to the decision referred and the aforementioned submissions, pursuant to the provisions of Article 455 of the Code of Civil Procedure.

IV - REASONS FOR THE DECISION

On the motion to dismiss the exhibits :

16. Venezuela's request to dismiss the exhibits is contained in the operative part of its conclusions but is no longer supported in its discussion.

17. In addition, the list of exhibits filed by Mr. and Ms. G. annexed to their latest submissions contains the reference to documents J98 to J141 and these are deemed to have been properly communicated.

18. The request shall therefore be dismissed.

On the main plea based on the lack of jurisdiction of the arbitral tribunal (Article 1520, 1° of the Code of Civil Procedure):

19. Primarily, Venezuela requests for the entire award ruling on jurisdiction to be set aside . It

contends that the arbitral tribunal lacked jurisdiction ratione materiae because of the lack of justification of the Spanish nationality of Mr. and Ms. G. at the time of the alleged investment.

On the pleas of inadmissibility of Mr. and Ms. G. :

20. Mr. and Ms. G. argue firstly that they have waived their claims in respect of investments made on dates on which it is disputed that they had Spanish nationality, that the arbitral tribunal undoubtedly had jurisdiction ratione materiae for investments made after they obtained Spanish nationality, that the arbitral tribunal applied its jurisdiction in the final award only in respect of these investments and compensated them only for the measures taken against these investments ; the principal claim of Venezuela, which alleges that the arbitrators ruled for their jurisdiction ratione materiae when such jurisdiction was allegedly lacking, has become moot, lacking any interest in bringing proceedings, and must therefore be declared inadmissible or dismissed as it having no merits.

21. In response, Venezuela contends that its plea of lack of jurisdiction ratione materiae raised before the arbitral tribunal is admissible, since its interest in bringing an action must be assessed at the date of that action, that is, before Mr. and Ms. G. have waived part of their claims, that it is still in its interest to obtain the setting aside of the award on jurisdiction before the Court, which remains unchanged, since Mr. and Ms. G. have not waived it, the arbitral tribunal having been relieved of this question on jurisdiction.

Thereupon,

22. Firstly, the interest of a party in bringing an action for setting aside an arbitral award shall be assessed as of the date of such action, the admissibility of which shall not depend on subsequent circumstances which would have rendered it moot.

23. However, at the date of the filing of the action for setting aside, on 14 January 2015, Venezuela had an interest in the proceedings which had not and has never been challenged.

24. The fact that Mr. and Ms. G. waived on 8 September 2017 the claims relating to investments made when they did not have Spanish nationality is therefore without effect on the assessment of Venezuela's interest in pursuing the proceedings to set aside the award on jurisdiction, relying in particular on violation of Article 1520.1 of the Code of Civil Procedure.

25. Secondly, the waiver by Mr. and Ms. G. of part of their claims before the arbitral tribunal following the judgment of the Cour of de Cassation leaves the award on jurisdiction stand, as the arbitral tribunal itself admitted it in its final award, in particular in paragraphs 228 and 435, refusing to rule again on its jurisdiction, contrary to the requests of Mr. And Ms. G..

26. Thirdly, Venezuela retains an interest in invoking the lack of jurisdiction ratione materiae of the arbitral tribunal, without having to justify at this stage the conditions for the success of its claim on this ground, in order to request the setting aside of the partial award on jurisdiction as a whole, which the appellant asks the Court to do, and which may consequently lead to the setting aside of the final award, thus overturning the award pronounced against it in favour of Mr. And Ms. G.. and obliging the parties to have the dispute settled by means of new arbitration.

27. The pleas of inadmissibility put forward by Mr. And Ms. G shall therefore be dismissed.

On the plea of inadmissibility of Venezuela :

28. Venezuela concludes that the pleas of Mr. and Ms. G. to the effect that the nationality of the investor must be assessed, in order to determine the existence of an investment within the meaning of the BIT, at the date of the measures and at the date of the submission of the request for arbitration, are inadmissible.

29. It argues that the referring Court can only set aside the award on jurisdiction totally in accordance with the judgment of Cour of Cassation, since it is now accepted that the nationality of the alleged investor at the time of the realization of its investment is an integral part of the definition of investment and that the Court cannot admit the jurisdiction of the arbitral tribunal with respect to certain investments as Mr. and Ms. G. would like.

30. It adds that the decision, admitted by the Cour of Cassation in its ruling that led to the referral to the Court of Appeal, can no longer be challenged at this stage by Mr. and Ms. G. who have waived their right to challenge the solution admitted by the Court of Appeal, that Mr. and Ms. G., in resuming their claim that the nationality of the alleged investor must be assessed at the date of the measures contested by the latter and of the presentation of the claim based on the BIT, contradict each other at the expense of Venezuela, which constitutes a procedural disloyalty amounting to estoppel which is enforceable against them.

Thereupon,

31. Firstly, since the Cour of Cassation overturned and annulled all the provisions of the ruling of 25 April 2017 and consequently restored "the case and the parties to the state they were in before that ruling", it follows that this decision leaves nothing of the ruling thus overturned and that the referring Court is required to examine all the grounds raised before it by the parties, regardless of the grounds that led to the quashing of the decision.

32. Mr. and Ms. G. may therefore oppose the action for setting aside on all grounds, even those already submitted to the Court of Appeal and which the Court had rejected in the ruling of 25 April 2017.

33. Secondly, procedural disloyalty amounting to estoppel must be established and have the consequence of misleading the opponent as to his intentions, contradicting himself to the expense of others, in order to prosper.

34. However, the fact for Mr. and Ms. G. to have waived part of their claims for payment and not to have lodged a cross-appeal, in order to comply with the judgment of appeal and to protect the integrity of the final award to come after the judgment of Cour of Cassation of 25 April 2017, does not imply an express waiver of the right to argue that the award ruling on jurisdiction was perfectly justified and to contest before the referring Court that the nationality of the investor at the date of the investment is a criterion for the arbitrators' jurisdiction under the BIT and to contradict all the pleas raised by Venezuela. This waiver by Mr. and Ms. G. does not reveal any procedural disloyalty to the detriment of Venezuela.

35. Consequently, the pleas of non-admissibility raised by Venezuela shall be dismissed.

On the merits:

36. Venezuela argues that the BIT imposes a nationality requirement at the time of the investment, that the nationality of the investor at the time of making the investment is an integral part of the definition of investment, that in this case the investments of Mr. and Ms. G. made in 2001 are not protected investments within the meaning of the BIT, because at that date Mr. and Ms. G. did not

have Spanish nationality, that by extension, the capital increases of 2006 do not constitute protected investments either, since these investments are also fraudulent.

37. Venezuela further argues that the BIT applies to "foreign direct investment", as set out in article 5 of the Economic Agreement between Spain and Venezuela, which is an integral part of the Treaty of Amity applicable on the basis of Article XI.4.c of the BIT, that the concept is purely economic and that since the centre of the personal, economic, political and legal ties of Mr. and Ms. G. are all in Venezuela, they cannot claim the benefit of "foreign direct investment". Venezuela also contends that the arbitral tribunal violated Article XI.4.b of the BIT for failing to apply the rules and principles of international law and Venezuelan law, in particular by not taking into account the fact that the investments of Mr. and Ms. G. do not appear in the Foreign Investment Register established by the Superintendencia de Inversiones Extranjeras de Venezuela, which would demonstrate that they never considered themselves as foreign investors.

38. It contests any payment for the shares and argues that subsequent capital increases cannot constitute investments within the meaning of the BIT. It argues that this plea is admissible since Mr. and Ms. G. had never availed themselves that the capital increases would constitute investments in their own right, prior to the partial setting aside of the award by the Court of Appeal.

39. Finally, Venezuela asserts that the Court seized of setting aside proceedings cannot find that the arbitral tribunal has jurisdiction for part of the investments and not for the others, since the award does not make any distinction.

40. In response, Mr. and Ms. G. argue that the BIT does not impose a nationality requirement at the time of the investment, that the BIT refers to the concept of investor, without limiting it to an investment dispute, that the BIT concept of investment is very broad, the relevant date for assessing the nationality of investors being not the date of the investments, but the date of the violation of the Treaty and the date of the commencement of the arbitration, that the court cannot add a criterion of temporality that is not provided for in the Treaty.

41. They submit that they did indeed owned investments in the territory of Venezuela and that they had Spanish nationality at the time of the violation of the Treaty in 2010 and the filing of the claim in 2012, that it is sufficient in any event to have had nationality at the time when part of the investments were made, that is, in 2003 for Ms. G. and 2004 for Mr. G., that the jurisdiction of the arbitral tribunal is therefore not in doubt.

42. They consider that Article XI.4 of the BIT does not apply to the question of the jurisdiction of the arbitral tribunal because it governs only the merits of the dispute, whereas only the BIT, which contains the offer of arbitration by Venezuela, is applicable for the purpose of determining the jurisdiction of the arbitral tribunal, since it provides for the specific conditions under which that offer exists and can be accepted, namely the combined terms of Articles I, XI(1) and (2) of the BIT. They also note that Venezuela accepts that the terms of the BIT are clear. Finally, Mr. and Ms. G. consider that the sources of law relied upon by Venezuela contradict each other.

43. They point to the reality of their investments and challenge Venezuela's argument that the 2006 capital increases do not constitute protected investments, as this plea is inadmissible as it was raised for the first time before the referring Court and has no merits. They recall Article 1466 of the Code of Civil Procedure and, on the merits, argue that the BIT covers "all types of assets", that it explicitly refers, in the definition of investment, to "shares", "any other form of participation in companies", as well as "rights arising from any type of contribution made with the aim of creating economic value", which is why it also covers capital increases, which they justify as real, both by witness statements and by proof of financial compensation. In any event, they maintain that the

mere holding of shares is sufficient to make them benefit from the Treaty for all their subsequent investments.

44. In the alternative, they request that the setting aside, should it be ordered, should relate only to investments prior to 2003.

Thereupon,

45. It should be recalled that the Judge in charge of setting aside proceedings reviews the decision of the arbitral tribunal on its jurisdiction, whether it found itself competent or not, by searching all elements of law or of fact which make it possible to assess the scope of the arbitration agreement. This is no different when, as in the present case, the arbitrators are seized on the basis of the provisions of a bilateral investment treaty.

46. In accordance with the provisions of the Articles 31 and 32 of the Vienna Convention on the Law of Treaties, a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose.

47. In the case of a Treaty offering investment arbitration, the jurisdiction of the arbitral tribunal shall be based on the consent of the State to be tried at the international level by an arbitral tribunal, its jurisdiction resulting from the proposed offer of arbitration and being circumscribed by the provisions of the Treaty. The applicability of the arbitration clause depends on the fulfillment of the conditions laid down in the said Treaty.

48. In the present case, the terms of the offer of arbitration result from the terms of the Bilateral Treaty for the Reciprocal Promotion and Protection of Hispano-Venezuelan Investments of November 2, 1995 (the BIT), which provides as follows :

« Article XI. Disputes between a Contracting Party and investors of the other Contracting Party

1. Any dispute arising between an investor of one Contracting Party and the other Contracting Party concerning the fulfillment by the latter of the obligations established in this Agreement shall be notified in writing with detailed information by the investor to the Contracting Party in which the investment is made . The parties to the dispute shall, to the extent possible, seek to settle such disputes by mutual agreement [...].

4. Arbitration shall be based on :
(a) The provisions of this Agreement and those of other agreements concluded between the Contracting Parties ;
(b) The rules and principles of International Law;
(c) The national law of the Contracting Party in whose territory the investment was made, including the rules on conflicts of law."

49. According to Article 1 of the BIT, for the application of this Agreement :
« 1. The term "investors" means :
(a) Natural persons who are nationals of one of the Contracting Parties under their national law and who make investments in the territory of the other Contracting Party. (…)

2. The term "investments" means any type of assets invested by investors of one Contracting Party in the territory of the other Contracting Party [...]. »

50. The applicability of the arbitration clause inferred from the Treaty depends on the fulfillment of

all the conditions required by the Treaty on the nationality of the investor and the existence of an investment.

51. It results from the terms of the BIT in their ordinary meaning, without needing any interpretation, that the investment protected by the Treaty is an asset invested by an investor of the other Contracting Party, so that the investment justifying the jurisdiction ratione materiae of the arbitral tribunal is that made by an investor which holds the nationality of the other Contracting Party, under its law, on the date on which it makes that investment in the territory of the other Party.

52. It is a fact that in 2001, on the date on which Mr. and Ms. G. claimed to have made investments in Venezuela for the protection of which they initiated the arbitration procedure provided for in the BIT, consisting of the acquisition of shares in companies T. and A., Venezuelan companies that belonged to the G. family group, Mr. G. and his daughter Mrs.G. had only Venezuelan nationality and were not Spanish nationals.

53. The arbitral tribunal, however, ruled for jurisdiction on the ground that it results from the terms of the BIT that "the nationality of the investor must be verified at the time of granting its consent or at the commencement of the arbitration, and not at the time of the realization of the investment for which protection is sought".

54. It found itself competent by setting aside any requirement of nationality at the date of the investment, and holding that the only condition for obtaining BIT protection was that the investor had the nationality of the investor's State at the date of the alleged breach of the Treaty or at the date of the commencement of the arbitration.

55. Accordingly, it decided that "the Claimants are 'investors' and the investments made by them are 'investments' within the meaning of Article I of the Treaty", rejected the plea of lack of jurisdiction raised by the Bolivarian Republic of Venezuela and ruled that this Tribunal has jurisdiction to deal with these proceedings and to settle the dispute between the Parties.

56. However, since the jurisdictional criteria established by the BIT are cumulative and indivisible, the arbitral tribunal, in failing to examine its jurisdiction ratione materiae in accordance with the terms of the Treaty and the offer of arbitration, and in failing to verify that the requirement of nationality of the investors was met on the day the investments were made, wrongly ruled for its jurisdiction to hear all the claims of Mr. And Ms. G.

57. Consequently, the award of December 15, 2014, excluding any element of temporality in the determination of the protected investments, without distinguishing the date on which they were made, must be set aside in its entirety, without there being any need for the Court of Appeal in charge of the setting aside hearing to distinguish according to the date on which the investments were made.

On the other requests:

58. Since Mr. and Ms. G. are unsuccessful, they shall be ordered to pay the costs and to pay Venezuela compensation under Article 700 of the Code of Civil Procedure, in the terms set out in the operative part of the judgment below.

ON THESE GROUNDS, THE COURT HEREBY

Ruling again, on referral following quashing by the Supreme Court,

1. Dismisses the claim to set aside exhibits J98 to 141 regularly submitted by Mr. and Mrs. G...
2. Dismisses the pleas of inadmissibility raised by Mr. and Ms. G..
3. Dismisses the pleas of inadmissibility raised by the Bolivarian Republic of Venezuela.
4. Sets aside the whole award rendered in Paris on 15 December 2014 by the arbitral tribunal composed of Messrs. T., O. and X.
5. Orders Mr. G. and Mrs. G. to pay to the Bolivarian Republic of Venezuela the sum of EUR 100,000 under Article 700 of the Code of Civil Procedure.
6. Orders them to pay allcosts of the proceedings.

Clerk ***President***
Clémentine GLEMET **Anne BEAUVOIS**