Dutch Supreme Court Finds for the First Time on Corruption and Arbitration in Context of Annulment Proceedings: Case Report on the *Bariven* and *Yukos* Decisions

W.J.L. de Clerck*

This article reports on the findings of the Dutch Supreme Court in its first two decisions on corruption and arbitration in the context of annulment proceedings. In the Bariven *decision of 16 July 2021, the Supreme Court reinstated an arbitral award which the Court of Appeal in The Hague had annulled, citing strong indications of corruption. The* Yukos *decision was handed down on 5 November 2021 but did not put an end to a saga which has been playing out in the Dutch courts since 2014. The annulment proceedings are currently pending before the Amsterdam Court of Appeal which will have to find on the merits of the Russian Federation's procedural fraud defence following cassation by the Supreme Court over a refusal to admit this defence by the Hague Court of Appeal. This article is a case report, and its aim is limited to providing non-Dutch readers with insight into the* Bariven *and* Yukos *Supreme Court decisions. The article includes an introduction on Dutch annulment proceedings, the public policy exception as applied in such proceedings, and the related but distinct action of revocation.*

Keywords: international arbitration, corruption, Netherlands, annulment, revocation, Bariven, Yukos

1 INTRODUCTION

There is an ongoing debate[1] in the international arbitration community on how to deal with corruption.[2] At the heart of the discussion is the question of judicial scrutiny of arbitral awards. To what extent can or should a court in annulment or enforcement proceedings verify that the arbitral tribunal's decision on corruption allegations made in respect of the claims at issue in the arbitration was correct? If arbitration is to be in practice the self-contained dispute resolution process which it is held out to be in theory, a scenario should be avoided where annulment

* A partner at Legaltree, a Dutch law firm. He is grateful to Max van Leyenhorst for his comments on an earlier draft of this article. Email: wouter.declerck@legaltree.nl.

1 *See* recently in this journal with further references to authorities: Olivier Caprasse & Maxime Tecqmenne, *The Evidence of Corruption in Investment Arbitration*, 39(4) J. Int'l Arb. (2022).

2 Corruption in court proceedings related to the arbitration is not covered here.

de Clerck, W.J.L. 'Dutch Supreme Court Finds for the First Time on Corruption and Arbitration in Context of Annulment Proceedings: Case Report on the *Bariven* and *Yukos* Decisions'. *Journal of International Arbitration* 39, no. 6 (2022): 881–904.

proceedings become a de facto appeal, or where enforcement of a valid arbitration award can be blocked easily. Equally, one might say these are platitudes, which take nothing away from the indispensable role of the annulment and enforcement courts as defenders of the public order against the pervasive effects of corruption.

Theoretical considerations aside, there remains a real risk that an annulment or enforcement court – however just the cause against corruption – will miss the mark and exercise a level of scrutiny that effectively amounts to a review on the merits of the award. This may expose a successful claimant in an arbitration to a rerun of a respondent's corruption defence despite the review and dismissal thereof by the arbitral tribunal.

A first Dutch Supreme Court[3] decision on the issue of corruption and arbitration was handed down on 16 July 2021[4] in annulment proceedings between *Bariven SA* ('Bariven'), a subsidiary and central purchasing company of the Venezuelan national oil company PDVSA, and *Wells Ultimate Service LLC* ('Wells'), a US company. The Supreme Court reinstated a 23 March 2018 ICC award, which the Court of Appeal in The Hague had annulled in a judgment of 22 October 2019 citing strong indications of corruption. This decision is discussed in section 3.

The *Yukos* decision was handed down by the Supreme Court on 5 November 2021[5] and is discussed in section 4. The decision concerns an annulment action filed by the Russian Federation with the aim to set aside six arbitral awards ('Yukos awards'[6]) rendered in favour of former Yukos shareholders *Veteran Petroleum Ltd, Yukos Universal Ltd*, and *Hulley Enterprises Ltd* (together 'Yukos shareholders'). The *Yukos* dispute spawned a myriad of Dutch litigation cases over the years and the Dutch annulment proceedings are likely the most extensive of the set, holding a treasure of case law on Dutch arbitration law. This article focuses on the Supreme Court's decision and the part of it which deals with corruption allegations made by the Russian Federation. The case is currently before the Amsterdam Court of Appeal which will have to find on the merits of the Russian Federation's procedural fraud defence following cassation of the judgment of the Hague Court of Appeal over its refusal to admit this defence in the annulment action.

The *Bariven* and *Yukos* arbitrations were both seated in The Hague. The relevant arbitral awards are therefore Dutch awards and annulment proceedings were filed before the Dutch courts. For background, section 2 provides an

---

[3] In Dutch: Hoge Raad der Nederlanden; referred to in this article as 'Supreme Court'.

[4] ECLI:NL:HR:2021:1171. Dutch case law is referenced in this article by way of the European Case Law Identifier (ECLI) number and digitally, www.rechtspraak.nl. Citations from case law are included in this article based on informal translations by the author.

[5] ECLI:NL:HR:2021:1645. Also available in an unofficial English translation (ECLI:NL:HR:2021:1879). In this article references are made to the Dutch authentic text.

[6] Three-interim awards of 30 Nov. 2009 and three final awards of 18 Jul. 2014.

introduction on (1) Dutch annulment proceedings; (2) the public policy exception as applied in such proceedings; and (3) the related but distinct action of revocation.

Research for this article was concluded by 1 June 2022. Dutch judgments published after that date are not taken into account.

2 ANNULMENT OF ARBITRAL AWARDS IN THE NETHERLANDS

2.1 Relevant provisions of the Dutch Arbitration Act

Arbitration is regulated in the Netherlands by the Dutch Code of Civil Procedure (DCCP), Articles 1020–1076.[7] Together these articles are commonly referred to as the '(Dutch) Arbitration Act'. Reference is made to the 2015 Arbitration Act as in force from 1 January 2015.[8]

Annulment of Dutch arbitral awards is regulated in Articles 1065–1067 DCCP. The procedure revolves around Article 1065 DCCP, which sets out in sub-article 1 five limited grounds for annulment of arbitral awards. These are, in summary: (1) absence of a valid arbitration agreement; (2) composition of the arbitral tribunal in violation of the applicable rules; (3) failure by the arbitral tribunal to comply with its mandate; (4) failure to sign the award or to set out the reasons for the decision in the award; and (5) violation of public policy by the award or the manner in which it was made.[9]

Under the current 2015 Arbitration Act, annulment of arbitral awards is handled in the first instance by the courts of appeal.[10] Recourse against a Dutch arbitral award is thus limited to one full instance on the appellate level, limited in scope however to the five annulment grounds discussed above. In principle, there is a subsequent right of cassation appeal to the Supreme Court on questions of law, unless the parties agreed to exclude the right to appeal to the Supreme Court altogether.[11] This is technically possible, but rarely seen in practice.

The 1986 Arbitration Act provides that annulment proceedings are filed in the first instance with the district courts.[12] With subsequent appeal and Supreme Court appeal, the Act thus provides for a three-tiered system for annulment proceedings. This was changed in the 2015 Arbitration Act to make for a quicker annulment

---

7 And in a few other laws, which need not be covered here.

8 Where applicable, specific reference is made to its predecessor, the 1986 Arbitration Act.

9 An unofficial translation of the 2015 Arbitration Act is available on the website of the Netherlands Arbitration Institute (NAI). Readers may refer to this page for the full text of Arts 1065–1067 DCCP and other articles from the Act referred to below (1 Jun. 2022), https://nai-nl.org/downloads/NAI%20translation%20DAA%20(Book%204%20DCCP).pdf.

10 Article 1064a(1) DCCP.

11 Article 1064a(5) DCCP. Scrutiny on cassation includes scrutiny of the correct application of the law on the facts of the case and the reasoning of such application.

12 Article 1064(2) DCCP (*rec.*).

procedure. The 1986 Arbitration Act remains relevant to date, because the Supreme Court confirmed in a recent decision that the 1986 Arbitration Act continues to apply to arbitrations filed prior to the enactment of the 2015 Arbitration Act (on 1 January 2015).[13]

The *Bariven* arbitration commenced in 2016 and the annulment proceedings were conducted under the two-tiered system of the 2015 Arbitration Act. The *Yukos* arbitration had been filed in 2004 and thus prior to the coming into force of the 2015 Arbitration Act, which meant that the three-tiered system for annulment proceedings as provided for under the 1986 Arbitration Act applied. The case went through two full instances on the district and appellate level before it reached the Supreme Court.

The deadline for filing an annulment action is set at three months from the date of issuance of the arbitral award.[14] There is a second three-month term which may start to run from the date on which the arbitral award is served on the award debtor for purposes of enforcement.[15] This presupposes that the award creditor obtained leave to enforce the award from the Dutch courts, which – in case of a Dutch award – may be applied for in *ex parte* proceedings.[16] Failure to observe the statutory deadline results in the annulment action being inadmissible.[17]

2.2 Focus on two annulment grounds

As discussed in the previous section, Article 1065 DCCP provides for five distinct statutory grounds for annulment of a Dutch arbitral award, two of which are most relevant to the *Bariven* and *Yukos* cases discussed in this article: (1) absence of a valid arbitration agreement; and (2) violation of public policy by the award or the manner in which it was made (the 'public policy exception').[18]

2.2[a] *Absence of a Valid Arbitration Agreement*

An arbitral award is subject to annulment pursuant to Article 1065(1)(a) DCCP if it is not based on a valid arbitration agreement. This annulment ground encompasses two main categories: an arbitration agreement may never have been concluded

---

13 *Kazakhstan v. Ascom*, 24 Dec. 2021, ECLI:NL:HR:2021:1990.
14 Article 1064a(2) DCCP.
15 *Ibid*.
16 Article 1062 DCCP.
17 Article 1064a(2) DCCP specifically provides that the right to an annulment action expires if not filed within the three-month term, regardless of which of the three-month terms discussed above applies.
18 The Supreme Court case law referenced in ss 2.2[a], 2.2[b] was confirmed in several respects in the (interim) decisions rendered by the Supreme Court in *Yukos* on 4 Dec. 2020 and 5 Nov. 2021. These (interim) decisions are discussed in s. 4.

under the applicable law or, even if an arbitration agreement was concluded, it may be deemed not to have been *validly* concluded.

A party seeking annulment is prevented from relying on Article 1065(1)(a) DCCP if it did not raise the purported issue over the absence of a valid arbitration agreement in the arbitration prior to submitting a defence on the merits. This is explicitly stated in the 2015 Arbitration Act with respect to the jurisdiction of the arbitral tribunal.[19] By way of reference thereto in Article 1065(2) DCCP, the same applies in annulment proceedings. The position is the same under the 1986 Arbitration Act.[20]

As will be discussed in more detail in the context of the public policy exception in the following section,[21] the restraint with which an annulment court must normally assess whether a ground for annulment under Article 1065(1) has arisen is not required when the arbitral award may be subject to annulment due to absence of a valid arbitration agreement.[22]

2.2[b] *Violation of Public Policy*

The main rules of engagement for application of the public policy exception in annulment proceedings pursuant to Article 1065(1)(e) DCCP are discussed in some detail by the Advocate-General in her advisory opinion in the *Bariven* annulment proceedings and may be summarized as follows.[23,24]

The public policy exception is interpreted narrowly by the Dutch courts, principally by following *international* public policy, which is understood to be a more limited notion of public policy within the broader concept of domestic public policy.[25] This narrow public policy exception has a two-pronged application in annulment proceedings: (1) materially, with respect to the contents of the award ('material prong' of the public policy exception); (2) formally, with respect to due process and impartiality and independence of the arbitral tribunal ('formal prong' of the public policy exception).

---

19 Article 1052(2) DCCP.

20 Articles 1052(2) and 1065(2) DCCP (*rec.*).

21 *See* s. 2.2[b].

22 Supreme Court in *Ecuador v. Chevron Corporation I*, 26 Sep. 2014, ECLI:NL:HR:2014:2837, para. 4.2.

23 Advisory opinion of Advocate-General De Bock of 11 Dec. 2020, ECLI:NL:PHR:2020:1176, para. 4.

24 The Advocate-General advises the Supreme Court but is not a member of the Court. Often the Supreme Court will follow the advisory opinion of the Advocate-General.

25 *See* in the context of enforcement of foreign arbitral awards in the Netherlands, but equally applicable to annulment proceedings: advisory opinion of Advocate-General B.J. Drijber in *Abo Management v. Respondents*, 12 Nov. 2021, ECLI:NL:PHR:2021:1060, para. 4.38 and Assen District Court in *[HMH] A/S v. Onderlinge Waarborgmaatschappij TVM*, 28 Nov. 2017, ECLI:NL:RBNNE:2017:4536, para. 4.12.

The application of the public policy exception in annulment proceedings is limited to cases where (to summarize standing case law of the Supreme Court) the contents or the enforcement of the arbitral award are contrary to mandatory laws that are of the most fundamental nature and thus considered part of the public order. In addition to mandatory laws against corruption and by way of example: Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anti-competitive agreements between two or more independent market operators, is to be considered, for purposes of Article 1065(1)(e) DCCP, as a mandatory law that is part of the public order.[26]

The public policy exception must be applied with due restraint on reviewing an arbitral award in annulment proceedings. The Supreme Court instructs that annulment proceedings must not amount to a quasi-appeal.[27] Another mantra used by the Supreme Court to underline that the public policy exception must be applied only under exceptional circumstances is that a conflict with public policy as referred to in Article 1065(1)(e) DCCP can only occur 'if the contents or implementation of the arbitral award is in conflict with mandatory laws of such a fundamental nature that compliance with those laws may not be prevented by restrictions of procedural law'.[28] Perhaps expressed more clearly is the recurring instruction of the Supreme Court that only in 'striking cases' may the court rely on this ground to annul an arbitral award.[29]

Restraint is thus exercised by the annulment court when it assesses if one or more of the statutory grounds for annulment apply. The exception to the rule are situations where a prima facie convincing case is made that the formal prong of the public policy exception is engaged, for instance over a due process violation by the arbitral tribunal.[30] Here the annulment court may exercise full scrutiny also on the facts. Unrelated to the public policy exception and as discussed in the previous section, the same applies when a valid arbitration agreement is purportedly absent.

As with a potential absence of valid arbitration agreement, a party must raise an issue that may result in a violation of public policy during the arbitration in a timely manner on pain of forfeiture of the right to advance an annulment ground on the basis thereof pursuant to Article 1065(1)(e) DCCP. See also Article 1048a

---

[26] Supreme Court in *Eco Swiss China Time v. Benetton International II*, 25 Feb. 2000, ECLI:NL:HR:2000:AD4669, para. 2.1.

[27] Supreme Court in *IMS v. Modsaf-IR I*, 17 Jan. 2003, ECL:NL:HR:2003:AE9395, para. 3.3.

[28] Supreme Court in *Eco Swiss China Time v. Benetton International I*, 21 Mar. 1997, ECLI:NL:HR:1997:AA4945, para. 4.2.

[29] Supreme Court in *Ecuador v. Chevron Corporation II*, 12 Apr. 2019, ECLI:NL:HR:2019:565, para. 4.3.2. *See also* advisory opinion of Advocate-General De Bock in *Bariven*, ECLI:NL:PHR:2020:1176, para. 4.21.

[30] Supreme Court in *IMS v. Modsaf-IR II*, 24 Apr. 2009, ECL:NL:HR:2009:BH3137 and in *Spaanderman v. Anova Food*, 25 May 2007, ECLI:NL:HR:2007:BA2495.

DCCP, which provides for a relinquishing of rights if the party concerned could reasonably have complained about the point at issue to the arbitral tribunal but failed to do so at all or in a timely manner. Article 1048a DCCP is based on Article 4 of the UNCITRAL Model Law. On its introduction in the 2015 Arbitration Act, the article codified in large part the position that was developed in case law of the Supreme Court under the 1986 Dutch Arbitration Act.[31]

The remaining annulment grounds under Article 1065 DCCP, pertaining to compliance by the arbitral tribunal with its mandate and the reasoning of the award, are subject to very limited scrutiny only. The same applies strictly speaking to questions over the composition of the arbitral tribunal or the signing of the award, but with these annulment grounds the assessment will in any case be of a more binary nature and the distinction between full and limited scrutiny is less relevant.

2.3 Additional action in case of procedural fraud: Revocation

Under Dutch arbitration law a party may file a distinct action and apply to have the award 'revoked' by the court if it finds out after the issuance of the final award that corruption occurred during the arbitration (also 'procedural fraud'). Pursuant to Article 1068 DCCP, a party may apply for revocation on the following, limited grounds: (1) that the arbitral award is based wholly or partly on fraud committed during the arbitration by or with the knowledge of the other party, which fraud is uncovered after issuance of the award; (2) that the award is based wholly or partly on documents which are discovered after the issuance of the award to be false; or (3) that, after the issuance of the award, a party comes into possession of documents which would have influenced the decision of the arbitral tribunal but which were withheld from it by the other party.

The deadline for filing a revocation action is more flexible than the one for an annulment action and set at three months from the moment when the procedural fraud is discovered.[32]

In case of fraud which is discovered during the arbitration, revocation is not the correct instrument. This follows from Article 1068 DCCP, which provides, as summarized above (1)-(3), in all three instances for discovery of the procedural fraud 'after issuance of the award'. Rather, a party must raise the issue timely with the arbitral tribunal during the arbitration with a view to a potential annulment action.[33]

---

[31] *See* Supreme Court in *Nordström v. Van Nievelt Goudriaan & Co*, 18 Feb. 1994, ECLI:NL:HR:1994:ZC1266.

[32] Article 1068(2) DCCP.

[33] Discussed in s. 2.2[b].

Revocation must be distinguished from annulment under Dutch arbitration law in a procedural sense, but if granted also results in the annulment of the arbitral award. In a practical sense, the distinction between corruption before or during the arbitration cannot always be made clearly. A party may engage in corruption regarding the rights in dispute and subsequently conceal the relevant facts from the arbitral tribunal and the counterparty. The distinction between annulment and revocation proceedings came to the fore in the *Yukos* annulment proceedings, discussed further below.[34]

3 *WELLS v. BARIVEN*

3.1 Background of the case

The *Bariven* award remains confidential, but part of it can be deduced from the Hague Court of Appeal's judgment and the advisory opinion of the Advocate-General, as referenced in the previous section.[35]

In summary, the corruption element in this case stemmed from indications of Wells having conspired to bribe Bariven officials to evade and work around the admissibility and qualification requirements for several Bariven tenders for drilling equipment. This resulted in the context of the relevant tender in the execution of an apparently regular, commercial contract pursuant to which Wells commissioned and delivered two top drives, a piece of equipment used on a drilling rig to drill the borehole, of which Bariven took delivery but for which it did not pay.

For a proper understanding of the background of the case, it is helpful to distinguish between pre- and post-award facts. The judgment of the Court of Appeal appears to hinge on several facts which took place after the issuance of the final award on 23 March 2018, facts on which the arbitral tribunal could not have relied for its decision. The Court of Appeal did however rely on such post-award facts to annul the award.

3.2 Court of Appeal

3.2[a] *Pre-award Facts*

The indications of corruption first pertained to the corporate structure, board composition and business activities of Wells. It was set up as a Texas company in

---

34 *See* s. 4.

35 *See* judgment of 22 Oct. 2019, ECLI:NL:GHDHA:2019:2677, paras 2.2–2.22 and advisory opinion of Advocate-General De Bock of 11 Dec. 2020, ECLI:NL:PHR:2020:1176, para. 1 for the facts and arguments of the parties covered here and in the following paragraphs.

May 2012, just under seven months before concluding the sales contract with Bariven in December of that same year. Various family members of the ultimate beneficial owner (UBO) of Wells held board or executive positions in the company. Notably, Wells only ever had a single client, Bariven, from which it made all its turnover. Out of this turnover substantial, unspecified 'professional fees' and 'factoring fees' were paid to companies related to the UBO from 2012–2015.

The way in which Wells participated in several tenders initiated by Bariven might also raise some eyebrows. Wells submitted false information to qualify and register as vendor with Bariven but was nevertheless accepted within seven hours of having submitted its application. Wells subsequently participated with success in three Bariven tenders, including the tender for the two top drives. At least four other companies related to the UBO of Wells participated in the three tenders. For the sale of the top drives, Wells and the four companies indirectly related to it submitted five bids, which were identically worded to the level of clerical errors and use of Spanish vowels. The exception was the price offered, which increased in percentual brackets from Wells' lowest offer of USD 11.7 million. Notwithstanding all this, Well's offer was approved by several Bariven officials including its then president.

Subsequently, Wells proceeded to have the top drives built by a Norwegian company, inspected on-site by Bariven and delivered to Bariven in Houston on or around 25 June 2014. It is not specified in the decision of the Court of Appeal, but it would appear that the top drives were technically in order and used by PDVSA for drilling activities.

On 10 December 2015, the UBO of Wells as well as former employees of Bariven were indicted in US criminal proceedings under the Foreign Corrupt Practices Act over allegations of having paid bribes to Bariven officials to retain contracts from PDVSA and its subsidiaries. Several of the persons indicted would go on to plead guilty to the corruption charges, including a Bariven official who was directly involved in the tender process for the top drives. However, Wells was neither indicted nor was it mentioned in the charging documents.

These facts and circumstances, as stated in the judgment of the Court of Appeal, occurred prior to the rendering of the award and it would appear that they were part of the arbitration file. They were not deemed sufficient, however, by the arbitral tribunal to hold that Bariven had proven that Wells obtained the purchase order for the top drives in a corrupt manner. It follows from the excerpts from the award cited in the decision that Bariven's fact submission in the arbitration suffered from a lack of specificity and were neither made timely nor in accordance with the procedural instructions of the arbitral tribunal.[36] In the

[36] Judgment of 22 Oct. 2019, ECLI:NL:GHDHA:2019:2677, paras 3.7–3.9.

annulment proceedings, the arbitral tribunal's decision to dismiss Bariven's corruption allegations on this basis was, however, not sustained by the Court of Appeal, as will be discussed further in the following section.

3.2[b] *Post-Award Facts*

Apart from it having a different view on the facts that were in the arbitration file and the weighing thereof by the arbitral tribunal – which is discussed below in section 3.4[b] – the Court of Appeal also considered facts which occurred after the rendering of the award on 23 March 2018. It concluded on the basis of these facts that there were strong indications of corruption. The considering of post-award facts is contentious from a perspective of Dutch arbitration law, on which further below.[37]

The information considered by the Court of Appeal included further incriminatory documents from the ongoing US criminal proceedings; extraditions from Spain; guilty pleas by and convictions of Bariven officials involved in the corruption scheme; as well as guilty pleas of Wells managers and the UBO of Wells. It is interesting to note that the Court of Appeal included in the judgment an excerpt from the US extradition request, which stated that it was Bariven's then president who:

> entered into a conspiracy with a group of then-current and former high-level officials of PDVSA and PDVSA subsidiaries which was referred to as the "management team" [which] solicited several PDVSA vendors … for bribes and kickbacks in exchange for providing assistance to those vendors in connection with their PDVSA business.[38]

It is apparent that particular weight was placed on the family relations between the UBO of Wells and its managers, which the Court of Appeal deemed too close for comfort, as well as the various guilty pleas and convictions attained by the prosecutor in the US criminal proceedings against these persons. The judgment of the Hague Court of Appeal includes a table which sets out this information, much of it derived from documents which only became available after the arbitration.[39]

3.3 Supreme court

The decision of the Supreme Court is only four pages long. That is concise even by Dutch standards. The rendering of a shorter than normal decision follows from the Supreme Court finding that the award rests on two independent findings of the

---

37 *See* s. 3.4[a].
38 Judgment of 22 Oct. 2019, ECLI:NL:GHDHA:2019:2677, para. 2.22(iv).
39 *Ibid*., para. 2.23.

arbitral tribunal, the second of which Bariven did not challenge in the annulment proceedings before the Hague Court of Appeal. Bariven's annulment challenge was thus too limited in scope. What was behind this?

Wells had argued from the start that, regardless of corruption allegations with respect to the tender process, the contract in dispute was a regular, commercial agreement pursuant to which it delivered two top drives to Bariven for which it was never paid. Accordingly, Wells argued in the alternative that, if the arbitral tribunal accepted Bariven's corruption defence and deemed the contract to be null and void, Wells should be compensated to the amount of the invoice value of the top drives. Under Dutch law, the *lex contractus*, Wells would have a right to claim that Bariven return the top drives or compensate the value of the top drives at the time of delivery. Having found that there was insufficient proof of corruption to deem the contract in violation of public policy, the arbitral tribunal awarded Wells' principal claim for payment and did not have to decide on the alternative claim. It did, however, give an *obiter dictum* on the alternative claim, concluding that under Dutch law 'also in the event of an annulment of the agreement on the basis of fraud or error, Bariven would have been obliged to reimburse Wells an amount corresponding to the purchase price'.[40]

The arbitral tribunal essentially held that in any event Bariven would have to pay a purchase price to Wells for the top drives that it had taken delivery of and which it never returned to Wells despite its position that the underlying contract was null and void.

Interestingly, the analysis of the Hague Court of Appeal was limited in scope to proof of corruption during the tender process and the question whether this was inextricably linked to the contract for the sale and purchase of the top drives. In the annulment proceedings, Wells had argued that Bariven's contention that it would not have to pay for the top drives because the contract allegedly resulted from corruption was rejected by the arbitral tribunal, not only because Bariven was unable to prove its contentions, but also because nullification of the contract could not result in Bariven being allowed to keep the top drives without paying any compensation to Wells. The Court of Appeal gave short shrift to this defence and held that the contractual implications of the nullification of the contract were outside the Court's purview in the annulment proceedings before it. This goes to the narrow scope of the annulment action filed by Bariven. Subsequently, the Court banged the door shut by holding that neither would it admit Bariven's remission-application to allow the arbitral tribunal to decide on the contractual

[40] Citation taken from the advisory opinion of Advocate-General De Bock of 11 Dec. 2020, ECLI:NL:PHR:2020:1176, para. 5.4.

implications of an annulment of the award and, consequently, a denial of Wells' claim to receive payment for the top drives under the purchase order.[41]

The *obiter dictum* by the arbitral tribunal provided an angle for Wells to challenge the judgment of the Hague Court of Appeal on cassation appeal and it did so with success. The Supreme Court found that the reasoning of the arbitral tribunal and the *obiter dictum* in particular are clearly to be interpreted to mean that the operative part of the award is also supported fully and independently by the *obiter dictum* of the arbitral tribunal. The Supreme Court then went on to conclude that the Court of Appeal should only have awarded the annulment application if it also deemed that Bariven could successfully challenge the arbitral tribunal's *obiter dictum* on compensation for the value of the top drives. But Bariven's annulment action, clearly, did not extend to this part of the arbitral award.[42]

3.4 Comments: Court of Appeal's findings on the public policy exception

The Supreme Court overturned the judgment on appeal on a technical cassation ground, as discussed above. As a result, it did not have to broach the subject of public policy and corruption. The cassation grounds advanced by Wells with regard to the public policy exception of Article 1065 DCCP therefore remained undecided. It is of interest to scrutinize certain findings of the Hague Court of Appeal more closely, even if they were not reviewed by the Supreme Court.

Violation of public policy was, as discussed, the principal ground advanced by Bariven in the annulment action filed with the Hague Court of Appeal.[43] Bariven's approach was two-pronged, in line with the public policy exception provided for in Article 1065(1)(e) DCCP[44]: it argued that both the contents of the award and the way in which the award was made violated public policy. The two prongs are discussed in turn below.

3.4[a] *Material Prong of Public Policy Exception*

First, Bariven argued that the contents of the award violated public policy, because the award sanctioned a sale and purchase agreement which was concluded under the influence of corruption.

---

41 Remission is provided for in Art. 1065a DCCP. It was introduced in the 2015 Arbitration Act.

42 This is less clear from the Court of Appeal judgment, but made explicit by the Supreme Court in its 16 Jul. 2021 decision, ECLI:NL:HR:2021:1171, para. 3.1.3.

43 Bariven additionally relied on a purported failure of the arbitral tribunal to provide reasons for the decisions given in the award, which ground was not adjudicated by the Court of Appeal and is not covered here.

44 Discussed in s. 2.2.

It has been explained that it is standing case law of the Supreme Court that the material prong of the public policy exception must be applied with due restraint.[45] Arguably, therefore, the Hague Court of Appeal should have applied a very light touch and should have refrained from a merits review of the arbitral tribunal's findings on the validity of the sale and purchase agreement for the top drives and how that contract held up in view of the corruption allegations made by Bariven. It is not clear from the judgment that the Court of Appeal exercised such restraint. To the contrary, it considered that it was at liberty under Article 1065(1) DCCP to 'independently ascertain' whether the contract for the top drives was a product of corruption.[46]

Furthermore, the Hague Court of Appeal's considering of post-award facts appears to add insult to injury. Even if full scrutiny by the annulment court is allowed because the formal prong of the public policy exception is relied on (or if it is argued that a valid arbitration agreement is absent) there is only limited room for considering new or, *in casu*, post-award facts.[47] Logically, the annulment court has even less room for manoeuvre if it must decide on the application of the material prong of the public policy exception, i.e., whether the contents of the arbitral award contravene public policy. Ostensibly, the Court of Appeal had a different view on this, considering that the scope of review exercised by it extended to 'facts which occurred after the rendering of the arbitral award'.[48]

All in all, it is questionable whether the Court's finding that the contents of the Bariven award resulted in a violation of public policy would have passed scrutiny on cassation appeal had the Supreme Court not set aside the judgment on appeal already on the *obiter dictum* element of the decision, as discussed previously.

3.4[b] *Formal Prong of Public Policy Exception*

Second, with respect to the formal prong of the public policy exception, Bariven argued that it did not get a fair hearing in the arbitration because certain evidence submitted in support of the corruption defence was not considered fully by the arbitral tribunal on the grounds that the evidence was not submitted timely in the arbitration. To be clear: this evidence *was* in the arbitration file, unlike the post-

---

45 *See* discussion and references in s. 2.2[b].

46 Judgment of 22 Oct. 2019, ECLI:NL:GHDHA:2019:2677, para. 5.6.

47 Supreme Court in *Smit Bloembollen v. Ruwa Bulbs*, 27 Mar. 2009, ECLI:NL:HR:2009:BG6433, para. 3.4.2.

48 Judgment of 22 Oct. 2019, ECLI:NL:GHDHA:2019:2677, para. 5.6. Advocate-General De Bock supports this position in her advisory opinion of 11 Dec. 2020, ECLI:NL:PHR:2020:1176, paras 4.22–4.23.

award evidence which the Court of Appeal also took into account.[49] Specifically, new fact submissions made by Bariven based on this evidence were considered only with respect to a minor aspect of the dispute and deemed inadmissible insofar as Bariven's main position on the alleged corruption was concerned.

Bariven's argument was aimed at a violation of due process, which, as discussed,[50] is one of two exceptions to the main rule that annulment grounds must be applied with due restraint (the second one being absence of a valid arbitration agreement). Potentially therefore, the Hague Court of Appeal would have been at liberty to fully scrutinize the arbitral tribunal's procedural decision not to admit certain evidence had it not already annulled the award under the material prong of the public policy exception (in part, based on a review of post-award facts). It did not however, for the reasons discussed above, and consequently the issue did not reach the Supreme Court.

The arbitral tribunal's decision not to consider fully certain evidence appears to have been made in an understandable attempt to structure the debate and avoid delays as a result of a party's choice not to produce certain documents until late in the arbitration.[51] Its subsequent decision on the basis of the admissible evidence before it that 'indications' of corruption were insufficient to meet the applicable standard of proof goes to an important aspect of the discussion on corruption and arbitration. The principal question seems to be whether a traditional evidence-based approach should be taken, or a more holistic test should be applied, whereby certain indicators of corruption (red flags) are deemed sufficient. It would appear the arbitral tribunal in Bariven took the former approach setting the bar at 'clear and convincing' evidence of corruption.[52]

An example of the latter approach can be found in another recent Dutch arbitral award rendered in a Netherlands Arbitration Institute (NAI) arbitration between Exem Energy, a Dutch limited liability company, and Sociedade Nacional de Combustíveis de Angola Sonangol, Angola's former state oil and gas company.[53] The dispute concerned performance of the respective obligations of the parties under a share purchase agreement. Sonangol raised a corruption defence against Exem Energy's claims in the arbitration. The arbitral tribunal considered the pivotal share transaction as a whole and concluded in a pointedly concise award that the transaction could not have been concluded at arm's length since it

---

49 *See* s. 3.4[a].

50 *See* s. 2.2[b].

51 Article 1036(3) DCCP instructs Dutch arbitral tribunals to avoid undue delays, as do the ICC Rules of Arbitration (2021 version: Art. 22(1)).

52 Citations taken from the judgment of the Hague Court of Appeal of 16 Jul. 2021, para. 3.4.

53 *Exem Energy BV v. Sociedade Nacional de Combustíveis de Angola Sonangol – EP*, Netherlands Arbitration Institute case no. 4687, 23 Jul. 2021. The full text of the award is available at (1 Jun. 2022), https://jusmundi.com/en/document/decision/en-exem-energy-v-sonangol-i-award-tuesday-27th-july-2021.

incorporated several illogical or uneconomical elements. The arbitral tribunal dismissed Exem Energy's defence that Sonangol had failed to produce 'clear, unambiguous evidence' of corruption.[54] The tribunal went on to consider that there could be no doubt that 'kleptocratic transactions by the ruling elite or establishment – in particular of this type and on this scale – [are] contrary to [Dutch] "*openbare orde*" (public order/public policy)' and, on that basis, concluded that the transaction was null and void under Dutch law.

Comparing arbitral awards is to some extent a matter of apples and oranges, but in this case the comparison would seem to underscore a missed opportunity for the Supreme Court to provide clarity on the evidence standard for proof of corruption in Dutch annulment proceedings. Some final thoughts can be offered here on the subject.

Under Dutch arbitration law, it is expressly within the arbitral tribunal's purview to decide on admissibility and submission of evidence, the applicable evidence standard and the weighing of evidence which is submitted.[55] Logically, this rule does not concern post-award facts, the considering of which by the Hague Court of Appeal was already commented on above. It follows that decisions made by the arbitral tribunal on evidence in the arbitration are in principle out of bounds for an annulment court. This boundary is not absolute. The formal prong of the public policy exception may extend to the arbitral tribunal's weighing of the evidence and warrant full scrutiny thereof by the annulment court if a prima facie convincing case for a violation of due process is made.[56] This is where the limitations on annulment court scrutiny and the exceptions thereto, as developed in Supreme Court case law discussed above,[57] come into play. In the context of Dutch annulment proceedings, the proper application thereof would seem to be of greater relevance than one or the other evidence standard.

4 *YUKOS*

4.1 Basic facts, arbitrations and prior proceedings

The facts of the *Yukos* case are by now well known and are discussed only briefly here. Yukos was a Russian State-owned oil and gas company when the majority of its shares were auctioned off in 1995/1996 to Bank Menatep, a banking group co-founded and chaired by Mikhail Khodorkovsky. These were the years of the 'Wild

[54] Claimant raised the defence in response to respondent's counterclaim for the annulment of the share purchase agreement on which claimant had based its claims.
[55] Unless the parties agreed differently: Art. 1039(1) DCCP.
[56] *See* s. 2.2[b].
[57] *Ibid*.

East', when the Russian State-planned economy transformed to a marked-oriented economy and state-owned assets were privatized, often under questionable circumstances. Question marks have since been placed over the legality of Bank Menatep's acquisition of its majority shareholding in Yukos. In 2003, Khodorkovsky was arrested on charges of fraud and tax evasion. The Russian tax authorities took the view that Yukos systematically and extensively evaded taxation. Subsequent tax assessments and seizures to the tune of USD 27 billion resulted in the bankruptcy of the company.

The Yukos shareholders were of the view that the Russian Federation unlawfully appropriated Yukos' assets. They filed arbitration proceedings against the Russian Federation on 31 October 2005 under the UNCITRAL Arbitration Rules (1976) and pursuant to the Energy Charter Treaty (ECT), a multilateral treaty between European States for the promotion of international cooperation in the energy sector, which the Russian Federation signed but never ratified.[58] The arbitration was administered by the Permanent Court of Arbitration (PCA) in The Hague, this city also being the seat of the arbitration.[59] The arbitral tribunal rendered three interim awards on admissibility and jurisdiction on 30 November 2009 and three final awards on 18 July 2014.

The progress of the Dutch annulment proceedings can be summarized as follows. The Russian Federation commenced annulment proceedings against the Yukos shareholders on 10 November 2014 before the Hague District Court. The proceedings were conducted under the 1986 Dutch Arbitration Act.[60] In what might be called a surprise decision, the District Court annulled the *Yukos* awards by judgment of 20 April 2016, because it deemed a valid arbitration agreement to be lacking. The Yukos shareholders successfully appealed the judgment and the Hague Court of Appeal, following an interim judgment of 25 September 2018,[61] reinstated the *Yukos* awards by final judgment of 18 February 2020.[62] In this judgment, it dismissed the jurisdiction defence and all further annulment grounds advanced by the Russian Federation. The Russian Federation filed cassation appeal on 15 May 2020. The Supreme Court issued interim decisions in the case on 25 September 2020[63] and 4 December 2020.[64] The final decision was handed down on 5 November 2021.[65]

---

58 Treaty of 17 Dec. 1994. A consolidated version of the 1994 Energy Charter Treaty and related documents is available on (1 Jun. 2022), www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.

59 Three (former) Yukos shareholders commenced separate arbitrations (PCA case nos. AA 226, AA227, AA228). The arbitrations were conducted conjunctively.

60 Since the arbitration commenced prior to the enactment of the 2015 Arbitration Act on 1 Jan. 2015.

61 ECLI:NL:GHDHA:2018:2476. Interim decisions are specifically addressed when relevant.

62 ECLI:NL:GHDHA:2020:234.

63 ECLI:NL:HR:2020:1511.

64 ECLI:NL:HR:2020:1952.

65 ECLI:NL:HR:2021:1645.

4.2 Scope of review

For the purpose of this article, the scope of review of the Supreme Court's decision of 5 November 2021 is limited in the following respects.

First, it is assumed that the reader has some knowledge of the contentious issues in the *Yukos* case, such as jurisdiction under the ECT and the contesting thereof by the Russian Federation over allegations of 'unclean hands' and the illegality of the investment. The Supreme Court's decision of 5 November 2021 is 133 pages long and can only be summarily introduced here.[66]

Second, the decision is discussed only insofar as it pertains to the Russian Federation's two-tiered corruption defence: (1) allegations made by it during the arbitration on the 'unclean hands' of the Yukos shareholders and the illegality of their investment; and (2) allegations made only in the appeal stage of the annulment proceedings (but neither in the arbitration nor in the first instance of the annulment proceedings) on (procedural) fraud comprising submission of fraudulent witness statements, withholding of relevant documents, and making secret payments to witnesses.

Third, and specifically with respect to the ECT: both tiers of the corruption defence, unclean hands and procedural fraud, aimed to attack the legality and existence of an 'Investment' and/or the qualification of the Yukos investors as 'Investor' under Articles 1(6)-(7) and 26 ECT and, consequently, the jurisdiction of the arbitral tribunal. A full discussion of the relevant clauses of the ECT and the interpretation thereof by the Court of Appeal and the Supreme Court pursuant to principles of international law is outside the scope of this article. It is however instructive to highlight the following two elements:

- The Court of Appeal held, and the Supreme Court sustained that in absence of an express requirement in the ECT that an investment made thereunder must be made in accordance with the law, unclean hands resulting from illegalities at the time of making the investment do not automatically negate the jurisdiction of the arbitral tribunal.[67] Notwithstanding this, the unclean hands defence turned on a different point, as is discussed in section 4.3.
- Despite its refusal to find on procedural fraud,[68] the Court of Appeal held – in the context of the various (other) arguments advanced by the

[66] *See* the decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, para. 3 for a summary of the facts, the claims of the parties and the relevant decisions of the Hague Court of Appeal. The arguments on cassation appeal of the Russian Federation and of the Yukos shareholders are summarized by the Supreme Court at para. 4.

[67] Decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, para. 5.4.7.

[68] *See* s. 1 and further below.

Russian Federation against the jurisdiction of the arbitral tribunal – that the ECT does not exclude from protection investments by foreign investors who are (indirectly) controlled by nationals of the host-state where the investment is made ('U-turn' investment). This finding was sustained by the Supreme Court[69] and may – as is discussed in section 4.5 – have a bearing on the chances of success of the procedural fraud defence in the continued annulment proceedings before the Amsterdam Court of Appeal.

4.3 Unclean hands: Decisions on appeal and cassation appeal

As mentioned, the Russian Federation advanced its unclean hands defence during the arbitration. It can be deduced from the final judgment of the Court of Appeal and (by reference thereto) the Supreme Court's decision that the Russian Federation principally relied on acts purportedly committed by Bank Menatep and Khodorkovsky and certain other persons ('Khodorkovsky et al'.[70]) in 1995/1996 at the time of privatization of Yukos.[71] The Russian Federation alleged that the Yukos shares were acquired illegally in 1995–1996 by manipulating the auction process and the paying of bribes. The corruption allegations directed at Bank Menatep and Khodorkovsky et al. were, according to the Russian Federation, part of a chain of events which extended to the period following the privatization of Yukos and also comprised the tax evasion scheme that was uncovered and prosecuted by the Russian Federation in 2003.

It appears from the decisions of the Court of Appeal and the Supreme Court that the Russian Federation did not allege that on acquiring their shareholding interests in 1999–2001 the Yukos shareholders themselves committed corruption or other illegal acts.[72] The Russian Federation instead presented a multi-pronged argument that Khodorkovsky et al. de facto controlled the Yukos shareholders and should be identified with the latter for purposes of the unclean hands defence. All of this was, however, as unsuccessful in the annulment proceedings as it had been in the arbitration.

---

69 Decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, paras 5.3.9–5.3.12.

70 A term used in the Russian Federation's statement of defence on appeal to address 'Russian persons who founded, own and control the Yukos-shareholders'. A term also used by the Russian Federation was 'the Russian Oligarchs'.

71 *See* decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, para. 5.4.10, where reference is made to the final judgment of the Court of Appeal of 18 Feb. 2020, ECLI:NL:GHDHA:2020:234, paras 5.1.11.7–5.1.11.9.

72 The Russian Federation did argue for the first time on cassation appeal that the Yukos shareholders themselves committed illegal acts after, but not at the time of acquisition of their shareholding interests in Yukos. The Supreme Court dismissed this argument as partially an argument of fact and therefore inadmissible on cassation appeal. Decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, para. 5.4.6.

The Court of Appeal's dismissal of the unclean hands defence and the annulment grounds advanced in connection therewith under Dutch arbitration law was twofold:

- first, with respect to the alleged absence of a valid arbitration agreement, it exercised – correctly[73] – full scrutiny and held that the arbitral tribunal was right to sustain its own jurisdiction under the ECT[74];
- second, with respect to the alleged violation of public policy, the Court of Appeal exercised – again correctly – restraint and held that prima facie the arbitral tribunal's dismissal of the alleged illegalities, as not standing in the way of awarding the claims of the Yukos shareholders, did not contravene public policy.[75]

The Supreme Court validated these findings on both counts, despite multiple cassation grounds advanced by the Russian Federation.[76]

Taking a closer look at the merits of the unclean hands defence (and putting details of Dutch cassation procedure aside), it is clear that instrumental to the dismissal thereof were the arbitral tribunal's findings, sustained by the Court of Appeal and the Supreme Court, that (1) that Bank Menatep and Khodorkovsky et al. are different legal persons than the Yukos shareholders and that the Yukos shareholders could not be held responsible for conduct of other legal persons before the Yukos shareholders acquired their shareholding interest in Yukos; and (2) that the alleged conduct of Bank Menatep and Khodorkovsky et al. was too far removed from the transactions by which the Yukos shareholders acquired their shareholding interests in Yukos.[77] In simpler terms: Bank Menatep and Khodorkovsky et al. may have committed corruption (or not), but they were in any case not the Yukos shareholders claiming protection of their investment under the ECT. It appears therefore that the broadly accepted legal notion that legal persons are separable and independent bearers of legal rights and obligations proved to be an indomitable barrier for the Russian Federation. Further observations are offered on this in the following paragraphs, since the Russian Federation's procedural fraud allegations – which remain to be decided by the Amsterdam Court of Appeal – appear to be aimed at reopening the debate on this element of the *Yukos* awards.

---

73 *See* the discussion of scrutiny in Dutch annulment proceedings in s. 2.2.
74 Judgment of 18 Feb. 2020, ECLI:NL:GHDHA:2020:234, paras 5.11.5–5.1.11.9.
75 *Ibid*., para. 9.8.7.
76 Decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, paras 5.4.2 et seq. and 5.4.8 et seq.
77 *Ibid*., paras 5.5.4, 5.4.7, 5.4.10–5.4.11.

4.4 Procedural Fraud: Decision on cassation appeal

As a second tier to its corruption defence, the Russian Federation alleged for the first time in the appeal stage that the Yukos shareholders defrauded the arbitral tribunal by submitting fraudulent witness statements, withholding relevant documents, and making secret payments to witnesses. It is helpful to include here (an unofficial translation of) the facts alleged in this regard by the Russian Federation, as they were summarized by the Court of Appeal in its judgment of 25 September 2018[78]:

(1) the Yukos shareholders lied to the arbitral tribunal by submitting false statements and withholding documents relevant to key issues in the arbitration, in particular by way of their denial that Khodorkovsky et al. did not control the Yukos shareholders;

(2) the Yukos shareholders concealed their true relationship with Khodorkovsky et al. and the widespread criminality pervading their alleged investment in Yukos, and they violated the arbitral tribunal's document production orders in this regard;

(3) the Yukos shareholders failed to produce inter alia 'responsive documents and communications that are believed to exist' regarding participation by Khodorkovsky et al. in the decision-making of the Yukos shareholders with respect to significant business transactions, in violation of an arbitral tribunal document production order;

(4) the Yukos shareholders withheld documents about the entire chain of transactions concerning the Yukos shares, thereby concealing their direct connection to Khodorkovsky et al. and the illegal acquisition of the Yukos shares by Khodorkovsky et al., in violation of a document production order issued by the arbitral tribunal;

(5) the Yukos shareholders made false statements in their submissions to the arbitral tribunal, advocating a separation between themselves and Khodorkovsky et al. and emphasizing the legality of their acquisition of shares in Yukos, despite the fact that documents in their possession indicated otherwise, as the acquisition of the shares was unlawful, invalid and therefore void; and

(6) Khodorkovsky et al. made secret payments to Andrei Illarionov, one of the key witnesses of the Yukos shareholders in the arbitration.

As with the Russian Federation's (failed) reliance on unclean hands, the alleged procedural fraud was aimed at two annulment grounds under Dutch arbitration law: (1) absence of a valid arbitration agreement; and (2) violation of public policy in respect of the contents of the Yukos awards (material prong).[79]

---

[78] ECLI:NL:GHDHA:2018:2476, para. 5.2.

[79] The Russian Federation did argue on appeal that its due process rights were violated in the arbitration (formal prong) but did not tie this to the procedural fraud defence. *See* Hague Court of Appeal judgment of 18 Feb. 2020, ECLI:NL:GHDHA:2020:234, paras 9.2–9.3.

Allegations of fraud committed during the arbitration are typically raised in revocation proceedings, as discussed above.[80] The Yukos shareholders argued by way of a preliminary procedural objection that the procedural fraud allegations, to the extent that they pertained to a violation of public policy, should have exclusively been made in separately filed revocation proceedings. The Court of Appeal sustained this objection in an interim judgment of 25 September 2018. The allegations where thus not substantively dealt with by the Court of Appeal.

The cassation ground directed by the Russian Federation against this procedural dismissal was successful and, following annulment of the interim and final judgment of the Hague Court of Appeal on this basis, the Supreme Court relegated the case to the Amsterdam Court of Appeal to find on the procedural fraud allegations.

It should be added that the Russian Federation's reliance on the first annulment ground (absence of a valid arbitration agreement) in connection with its procedural fraud defence is not apparent from the Supreme Court's decision or the final judgment of the Court of Appeal of 18 February 2020 but follows from the latter court's interim judgment of 25 September 2018.[81] This annulment ground was not included in the preliminary dismissal of the procedural fraud defence, which the Hague Court of Appeal explicitly tied to the alleged violation of public policy.[82] This must mean it was denied on the merits as part of the Hague Court of Appeal's broader dismissal of the arguments advanced by the Russian Federation against the jurisdiction of the arbitral tribunal. However, it is suggested in the next section that the argument may still resurface in the continued debate on procedural fraud before the Amsterdam Court of Appeal.

4.5 Comments and outlook for the continued annulment proceedings

The findings of the Supreme Court on the interplay between annulment and revocation proceedings are a welcome addition to the body of case law on Dutch arbitration law. Its conclusion that there is no legal basis to deny a party the right to submit fraud allegations in annulment proceedings if these allegations could equally be submitted in revocation proceedings clarifies a previously undecided issue.

For purposes of this article, it is particularly interesting to look ahead towards the continued annulment proceedings. It is helpful then that the Supreme Court, in what might be called an *obiter dictum*, gave several instructions to the Amsterdam

[80] *See* s. 2.3.

[81] ECLI:NL:GHDHA:2018:2476, para. 5.1(i)-(iii), where both annulment grounds are grouped under the heading 'the arguments regarding fraud in the arbitration'.

[82] *Ibid*., para. 5.8.

Court of Appeal for the assessment of the Russian Federation's procedural fraud defence.[83] Some tentative predictions are offered in the following paragraphs on how these instructions may play out in the continued annulment proceedings.

4.5[a] *Timeliness*

The Supreme Court clarified one issue beforehand: Article 1068 DCCP on revocation must not be interpreted to mean that the three-month deadline for filing a revocation action[84] also applies if procedural fraud is raised in the context of annulment proceedings. This would seem to preclude a defence from the Yukos shareholders that this period had already lapsed when the Russian Federation raised procedural fraud in the statement of defence on appeal on 28 November 2017. This was well over three months after the discovery thereof, which – according to the Russian Federation – had been shortly after issuance of the judgment in the first instance on 20 April 2016.

By way of procedural background: the Yukos shareholders filed an appeal against the annulment of the *Yukos* awards by the Hague District Court by judgment of 20 April 2016. As a rule, a respondent on appeal must include all its arguments and defences in the statement of defence on appeal. This means that the Russian Federation's options to pro-actively raise procedural fraud at an earlier stage of the appeal proceedings were limited. Nevertheless, this instruction for the continued annulment proceedings seems congruent with the principal decision of the Supreme Court that an annulment action and a revocation action are available in parallel under Dutch arbitration law and that the limitations to one action must in principle not infringe on the admissibility of the other.

More generally, it will be a main point of debate before the Amsterdam Court of Appeal whether the procedural fraud defence was raised timely and in accordance with general due process requirements. It is difficult to venture an opinion on the outcome of that assessment without having access to the full litigation file and the submissions filed by the parties.[85]

4.5[b] *Scope of Debate*

A related issue will be the scope of the debate before the Amsterdam Court of Appeal and whether – as alluded to above – the existence of a valid arbitration agreement may be disputed again in connection with the procedural fraud

---

[83] Decision of 5 Nov. 2021, ECLI:NL:HR:2021:1645, paras 5.1.13 et seq.
[84] *See* s. 2.3.
[85] These are not publicly available in Dutch court proceedings.

allegations, despite the fact that the Court of Appeal heard and ultimately dismissed the arguments advanced by the Russian Federation in support of this annulment ground (as opposed to its preliminary dismissal of the procedural fraud allegations in connection with a violation of public policy).

It seems possible that this annulment ground will indeed resurface in view of the Supreme Court's further instruction to the Amsterdam Court of Appeal that so long as an annulment ground is stated in the summons, the applicant is in principle at liberty to submit further or new fact allegations in support thereof, subject to the due process considerations previously mentioned.[86] If the Amsterdam Court of Appeal finds that the procedural fraud allegations can clear the due process barrier and the Russian Federation succeeds in evidencing new, concrete, and relevant facts, it would not seem that the Russian Federation is per se barred from relying on these facts in support of all relevant annulment grounds stated in the summons, including absence of a valid arbitration agreement.

4.5[c] *Merits*

In addition to admissibility and scope of debate, there are the merits of the procedural fraud allegations. As foreshadowed, it appears from the facts alleged by the Russian Federation that if the procedural fraud defence is entertained, it will result in a reopening of the debate on the position of the Yukos shareholders as separable legal persons from Khodorkovsky et al. and the corruption purportedly committed by the latter.

At least two hurdles for the Russian Federation can be identified in this regard. These stem from the finding of the Supreme Court that U-turn investments are not excluded from protection under the ECT,[87] as well as certain inherent limitations to the judicial scrutiny the Amsterdam Court of Appeal may exercise in the context of a public policy exception,[88] which are discussed in turn below.

First, it would seem that the above fact allegations are at least partly aimed at establishing that Khodorkovsky et al. did control the Yukos shareholders, that their investment was a U-turn investment which does not enjoy protection under the ECT, and that therefore a valid arbitration agreement is non-existent. Notwithstanding the full scrutiny of the Amsterdam Court of Appeal that would come with an admissible reliance on this annulment ground, one may question how far the argument will eventually go. It would seem that the Supreme Court's

---

[86] The Supreme Court refers to its decision in *Breeders v. Burshan*, 27 Mar. 2009, ECLI:NL:HR:2009:BG4003. Also relevant would seem to be its decision in *Smit Bloembollen v. Ruwa Bulbs*, 27 Mar. 2009, ECLI:NL:HR:2009:BG6433.

[87] *See* s. 4.2.

[88] *See* s. 2.2.

finding that U-turn investments are not excluded from protection under the ECT is a *de iure* decision on the proper interpretation of the ECT which may encompass all that the Russian Federation may de facto uncover regarding the connections between the Yukos shareholders and Khodorkovsky et al.

Second, whilst it is not inconceivable that there is a 'bombshell' among the evidence that the Russian Federation will presumably submit to substantiate the above fact allegations, it will have a very high standard to meet. It has been explained that the public policy exception must be applied with due restraint and that only in striking cases may the court resort to this exception to annul an arbitral award. Moreover, the Russian Federation's reliance on the public policy exception pertains to the contents of the *Yukos* awards (material prong),[89] which means the Amsterdam Court of Appeal will not exercise full scrutiny of the facts or the arbitral tribunal's decisions. Apart from this, one may question how striking the procedural fraud alleged by the Russian Federation may turn out to be. The allegations do not appear to concern as yet unknown defects in the *Yukos* awards. Rather, they pertain to grievances of the Russian Federation which have been argued extensively but without success in the arbitration and in three instances in the annulment proceedings. There is an element of repetition here, which may not be lost on the justices in Amsterdam.

[89] *See* s. 4.4.