Court assumes jurisdiction despite arbitration clause in Petrobas' articles of association (Rotterdam District Court)

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In *Stichting Petrobas Compensation Foundation v Petrobas and others ECLI:NL:RBROT:2018:7852)*, the Rotterdam District Court ruled that it had jurisdiction despite an arbitration clause in Petrobas' articles of association.

Speedread

Following criminal investigations into money laundering and a construction cartel at Petrobas in Brazil, several Petrobas officials were criminally sentenced for fraud. As a result, Petrobas investors commenced civil proceedings against Petrobas and related companies and persons in Brazil and the United Sates. In the United States, Petrobas entered into a class action settlement with its investors for a total amount of USD 2.95 billion.

In January 2017, Amsterdam-based Stichting Petrobas Compensation Foundation, acting on behalf of Petrobas investors that, directly or indirectly, traded Petrobas shares outside of the United States, commenced proceedings against Petrobas and a number of individuals and Dutch Petrobas affiliates involved in the fraud. Petrobas and other defendants argued that the Rotterdam District Court lacked jurisdiction for a number of reasons, including the existence of an arbitration clause in Petrobas' articles of association.

The Rotterdam District Court assessed whether the arbitration clause in Petrobas' articles of association prevented the court from having jurisdiction with respect to claims filed on behalf of (former) Petrobas shareholders. The court ruled that, under both Brazilian law and Dutch law, the arbitration clause in the articles of association did not constitute a valid arbitration clause. The English version of the arbitration clause did not expressly stipulate that disputes regarding Petrobas should be brought in arbitration and not before state courts, neither did it specify an arbitration institution.

The decision confirms that, to avoid such disputes, arbitration clauses in articles of association should at least make clear which disputes are to be submitted to which arbitration institute in order for the arbitration clause to be valid. (*Stichting Petrobas Compensation Foundation v Petrobas and others (ECLI:NL:RBROT:2018:7852, 19 September 2018).*)

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Background

Pursuant to Article 1074 section 1 of the *Dutch Civil Procedural Code* (*Wetboek van Burgerlijke Rechtsvordering*), if a dispute is brought before a Dutch state court, when the parties have agreed to arbitrate disputes outside the Netherlands, the court must decline jurisdiction if a party invokes the arbitration agreement before or when submitting its defence. If the arbitration agreement is invalid under the applicable law, the state court may nonetheless assume jurisdiction.

Under Dutch international private law, more specifically pursuant to Article 10:166 of the *Dutch Civil Code* (*Burgerlijk Wetboek*), an arbitration agreement is valid if it is valid under the law chosen by the parties, under the law of the place of arbitration, or under the law applicable to the legal relationship to which the arbitration agreement applies (the underlying agreement).

Facts

Petrobas is one of the largest oil and energy companies in the world. The shares in Petrobas are owned by the Brazilian state and investors worldwide. The relevant English version of Article 58 of Petrobas' articles of association states:

> "Disputes or controversies involving the Corporation, its shareholders, managers and members of the Audit Board shall be resolved according to the rules of the Market Arbitration Chamber, with the purpose of applying the provisions contained in Law n° 6,404 of 1976, in these Bylaws, in the rules issued by the National Monetary Council, by the Central Bank of Brazil and by the Brazilian Securities and Exchange Commission (Comissào de Valores Mobiliários - CVM) as well as in all further rules applicable to the operation of the capital market in general (...)."

In 2009, criminal investigations into money laundering by criminal organisations commenced in Brazil. As of 2014 the investigations also concerned a construction cartel. Participating construction companies committed fraud by imposing a surcharge to Petrobas and by paying a kick-back fee to senior Petrobas officials and political parties between 2004 and 2014. Some Petrobas officials have been criminally sentenced and some received reduced sentences in return for their statements.

As a result of the fraud, Petrobas investors commenced civil proceedings against Petrobas and related parties in Brazil and the United Sates. In July 2015, a New York court ruled that the arbitration clause of Petrobas' articles of association constituted a valid arbitration clause for those who bought Petrobas securities on the Brazilian stock exchange, but that this clause did not apply to claims based on the (United States) Exchange Act. This decision was ratified on appeal in July 2017. In January 2018, Petrobas entered into a class action settlement with Petrobas investors for a total amount of USD 2.95 billion, approved by a New York court.

In January 2017, Amsterdam-based Stichting Petrobas Compensation Foundation, acting on behalf of Petrobas investors that, directly or indirectly, traded Petrobas shares outside of the United States, commenced proceedings against Petrobas and a number of individuals and Dutch affiliates, seeking several legal declarations that Petrobas and others acted unlawfully towards the Petrobas investors by, amongst others, commencing and concealing the fraud. Petrobas and other defendants argued that the Rotterdam District Court lacked jurisdiction for a number of reasons, including on the basis of the arbitration clause in Petrobas' articles of association.

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Decision

The Rotterdam District Court held that it had jurisdiction over the dispute despite the arbitration clause in Petrobas' articles of association.

In its decision, the Rotterdam District Court addressed among other things, whether the arbitration clause in Petrobas' articles of association prevented the court from having jurisdiction with respect to claims filed by the Foundation on behalf of former Petrobas shareholders. The court ruled that the English version of the arbitration clause, and not the original Portuguese clause, was relevant for the matter at hand, as the Petrobas investors are located all over the world.

As the arbitration clause did not include a choice of law clause, the place of arbitration or the law applicable to the legal relationship to which the arbitration agreement applies, governed the validity of the arbitration clause.

According to the Rotterdam District Court, the arbitration clause did not state that disputes between Petrobas and its shareholders are subject to arbitration, neither did it specify an arbitral institution. Therefore, Petrobas investors could not have known that Petrobas wanted to make disputes with them subject to arbitration. On this basis, the court ruled that, under Brazilian law, Article 58 of Petrobas' articles of association did not constitute a valid arbitration clause. For the same reasons, the court ruled that the arbitration clause was invalid under Dutch law as well. The fact that Brazilian and US courts may have ruled differently did not change the court's conclusion, as it was not established that these courts ruled that the English version of the arbitration clause was valid.

The court concluded that the arbitration clause did not prevent the court from having jurisdiction.

Comment

The judgment shows that, if an arbitration clause is incorporated in articles of association of a company, it should be made crystal clear which disputes are to be submitted to which arbitration institute. Clauses that do not meet these standards may very well be held to lack legal effect. Moreover, the judgment shows that extra attention should be given to the translation of an arbitration clause, and to specifying which is the governing language. Petrobas had argued that the arbitration clause was incorrectly translated into English, but this argument failed because its shareholders could not have been aware of that.

Case

Stichting Petrobas Compensation Foundation v Petrobas and others (ECLI:NL:RBROT:2018:7852) (19 September 2018).

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