United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7068 **September Term, 2018**

FILED ON: FEBRUARY 14, 2019

CRYSTALLEX INTERNATIONAL CORPORATION,
APPELLEE

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-00661)

Before: HENDERSON and WILKINS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. We have afforded the issues full consideration and have determined that they warrant neither oral argument nor a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 34(j), 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

Crystallex International Corporation is a Canadian gold mining company. Crystallex acquired the rights to explore and develop gold deposits in the Las Cristinas region of Venezuela. It invested at least $240 million in the project. To begin mining, Crystallex needed permits from the Venezuelan Ministry of Environment. After Crystallex completed the permitting requirements, the Ministry issued a letter representing that the permits would issue once Crystallex posted a bond. Then Crystallex posted the bond. Nearly a year later, the Ministry denied the permits based on environmental concerns. The Venezuelan government soon after nationalized the Las Cristinas mine.

Crystallex initiated international arbitration proceedings, alleging that the denial of the permits and expropriation of the Las Cristinas mine violated a bi-lateral treaty between Canada and Venezuela. The arbitration tribunal agreed and awarded Crystallex a little over $1.2 billion in damages. Crystallex eventually petitioned in federal district court, seeking confirmation of the arbitral award under the United Nations Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, and under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*. Venezuela opposed the petition and moved to vacate the arbitral award under the FAA. In a thorough order, the district court confirmed the arbitral award and denied the motion to vacate. Venezuela appeals.

None of Venezuela's three arguments on appeal comes close to securing a reversal. *See Kurke v. Oscar Gruss & Son, Inc.*, 454 F.3d 350, 354–55 (D.C. Cir. 2006) ("We review a district court's confirmation of an arbitration award for clear error with respect to questions of fact and de novo with respect to questions of law."). *First*, Venezuela claims that the district court overlooked its arguments that the arbitral award should be vacated under the FAA. To the contrary, the district court considered all of Venezuela's FAA arguments and applied the correct standard of review drawn from FAA case law. Indeed, the district court repeatedly cited the motion to vacate—the very motion Venezuela complains was overlooked. Perhaps the district court could have made clearer that it was simultaneously rejecting Venezuela's arguments opposing confirmation under the New York Convention and in favor of vacating under the FAA. Any such labelling error was harmless. 28 U.S.C. § 2111 (courts "shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").

Second, Venezuela argues that the district court erroneously reviewed the arbitral award's method of calculating damages under a deferential standard and should have instead reviewed the question *de novo*. Courts generally review *de novo* questions of arbitrability and otherwise give considerable deference to arbitral awards. *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441–43 (D.C. Cir. 2009). Because arbitration is a matter of contract, however, parties can agree to authorize the arbitrator to decide arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). That is what happened here. The parties consented to arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Additional Facility Rules. *See* Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments art. XII(4), July 1, 1996, 2221 U.N.T.S. 7. The Additional Facility Rules unmistakably delegate questions of arbitrability to the arbitration tribunal. *See* ICSID Arbitration Additional Facility Rules, art. 45(1) ("The Tribunal shall have the power to rule on its own competence."); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* 146 F. Supp. 3d 112, 121–22 (D.D.C. 2015) (ICSID Additional Facility Rules delegate arbitrability questions to arbitration tribunal); *cf. Chevron Corp. v. Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (nearly identical clause in Arbitration Rules of the United Nations Commission on International Trade Law delegates arbitrability to arbitrator). Regardless whether the calculation-of-damages argument raises a question of arbitrability, then, the district court did not err.

Third, Venezuela contends that the district court confirmed the arbitral award based on several misunderstandings of the arbitration tribunal's reasoning. We disagree. Venezuela first accuses the district court of upholding the arbitration tribunal's choice of valuation date based on the faulty premise that "Venezuela had committed wrongful acts" before April 13, 2008. But the arbitration tribunal used the phrase "wrongful acts" to describe its calculation of the "last clean date," an element of the "stock market approach." The district court's use of the phrase "wrongful act" accurately characterizes the arbitral award. Venezuela also argues that the district court erroneously believed the arbitration tribunal could calculate damages using a valuation date other

than April 14, 2008. The district court operated under no such error. It knew well that the "overall purpose of the [stock market] method is still to calculate a value for Crystallex's investment on the valuation date" of April 14, 2008.

The parties' conduct on appeal warrants a brief discussion. On September 11, 2018, we scheduled oral argument for Monday, January 14, 2019. The parties had purportedly reached a settlement agreement on September 10, 2018 yet failed to alert the Court until six days before oral argument. Had the parties kept the Court apprised of the settlement negotiations, they would have spared the Court unnecessary use of judicial resources, especially time spent preparing for oral argument. This lapse in professional judgment should not have occurred. Venezuela committed a second misdeed, one meriting sanctions. On January 8, 2019, Venezuela filed an emergency motion to hold this case in abeyance. The motion represented that Crystallex had requested Venezuela to seek a stay based on the purported settlement agreement. That representation was misleading. At the time Venezuela filed the emergency motion, Crystallex had declared in the press and in Third Circuit filings that Venezuela had breached the agreement. *See* Mot. to Expedite Oral Arg. 12, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, Nos. 18-2797, 18-3124 (3d Cir. Dec. 21, 2018); Andrew Scurria, *Bankers Hired for Citgo Auction Following Scrapped Deal With Venezuela*, Wall St. J. (Dec. 12, 2018), https://on.wsj.com/2SLgaxB. Venezuela's emergency motion was thus misleading and meritless. As a sanction, we believe Venezuela should pay Crystallex's reasonable attorneys' fees and costs incurred in responding to the emergency motion. D.C. Cir. R. 38.

This disposition will not be published. D.C. Cir. R. 36. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk