

Attorney-General advises Dutch Supreme Court to reject cassation of decision setting aside an award due to corruption

by *Practical Law Arbitration*, with *Van Oosten Schulz De Korte Advocaten*

Legal update: case report | Published on 27-Jan-2021 | The Netherlands

In *Wells v Bariven* (ECLI:NL:PHR:2020:1176), the Attorney-General has advised the Dutch Supreme Court to reject the appeal against a decision by the Appeal Court in The Hague setting aside an ICC award due to corruption.

Jurjen de Korte and Geert Wilts, Van Oosten Schulz De Korte Advocaten

The Attorney-General (AG) has advised the Dutch Supreme Court to reject an appeal against a decision by the Appeal Court in The Hague setting aside an ICC award.

In October 2019, the Appeal Court set aside an award, ordering a PDVSA subsidiary, Bariven, to pay USD12 million to Wells for the purchase of propulsion engines under an agreement that was held to be influenced by corruption (see [Legal update, Dutch court sets aside ICC award holding that underlying agreement was influenced by corruption \(Court of Appeal in The Hague\)](#)). Wells appealed that decision to the Supreme Court.

First, the AG emphasised that the prohibition of corruption is of such fundamental importance that compliance cannot be limited by procedural rules.

The first ground of appeal concerned the tribunal's finding, obiter dictum, that even if the underlying agreement was influenced by corruption, Bariven would still need to compensate Wells for the actual value of the engines, equivalent to the purchase price. The AG advised that obiter dictum does not form the operative part of the award. Further, the award only granted the principal claim for payment on the premise that the purchase agreement was valid and did not concern the hypothetical situation in which the purchase agreement was declared null and void.

The second ground of appeal was directed against the Appeal Court independently reviewing whether the conclusion of the purchase agreement was influenced by corruption. The AG considered that, even though the tribunal had assessed whether the purchase agreement was influenced by corruption, the Appeal Court was entitled to fully re-examine the corruption allegations.

The Supreme Court will now render its decision. Although the Supreme Court follows the AG's advice in most cases, here that approach would be quite worrisome for Netherlands-based arbitration. After all, the outcome would be contrary to the intention of the tribunal as clearly expressed in the obiter dictum. It would also extend the possibilities for parties to argue, and state courts to set aside, an award due to violation of public order and to perform a review of the merits, potentially even after the statutory deadlines for setting aside applications have run out (such applications must be filed within three months of the date of the award or enforcement request).

Case: *Wells v Bariven* (ECLI:NL:PHR:2020:1176) (11 December 2020).

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