

Court of Appeal in The Hague refuses enforcement of \$15 billion award against Malaysia

by *Practical Law Arbitration*, with *OSK Advocaten*

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In *Claimants v Malaysia (ECLI:NL:GHDHA:2023:1184)*, the Court of Appeal in The Hague refused enforcement of an award ordering Malaysia to pay \$15 billion under a perpetual lease agreement for parts of the former Sultanate of Sulu.

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The Court of Appeal in The Hague has refused to enforce a \$15 billion award obtained by the heirs of the Sultan of Sulu under an agreement entered into in 1878 for the perpetual lease of islands belonging to the former Sultanate.

First, the court ruled that a June 2021 decision of the Madrid court, annulling an earlier decision for appointment of the sole arbitrator because Malaysia was not properly served with those proceedings, could be recognised in the Netherlands. Consequently, the arbitrator's mandate had ended and he could not render an award.

The court then assessed the validity of the arbitration agreement. It ruled that Malaysia had not waived its right to dispute the existence of a valid arbitration agreement in the enforcement proceedings by not appearing in the arbitration.

The court then applied French law, as the law of the seat of arbitration, to determine validity. French law was applicable because, after the Madrid court terminated the arbitrator's appointment, the arbitrator relocated the arbitration to Paris (for which action the arbitrator is being prosecuted in Spain). Applying French law, there was no arbitration agreement because:

- The provision submitting disputes "to the consideration and views of her Majesty's Consul General in Brunei" did not imply that the parties intended to refer disputes to arbitration.
- The jurisdiction of the state courts was not excluded, as confirmed by the actions of the heirs' predecessors in filing a claim under the agreement with the High Court of North Borneo, resulting in a judgment of 1939.
- The Consul General was not an independent third party. The person occupying that position at the time was involved in the conclusion of the agreement on behalf of the Sultan of Sulu and represented the colonial interests of the British government.

Lastly, the court refused enforcement because the Paris court had suspended enforcement of the award (*article V(1)(e), New York Convention*). The Dutch court held that there was every reason to refuse enforcement given the high amount at stake and the extraordinary course of the arbitration.

Although the decision is subject to cassation at the Dutch Supreme Court, it is very unlikely that the grounds for refusal of enforcement of this infamous award will be overturned. All eyes will now be on the outcome of (appeal) proceedings in France on the suspension of enforcement, the permission for enforcement and the setting aside of the award.

Case: *Citizens v Malaysia (ECLI:NL:GHDHA:2023:1184) (27 June 2023)*.

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