

Dutch Supreme Court confirms refusal to enforce \$15 billion award against Malaysia

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

Legal update: case report | [Published on 20-Sep-2024](#) | The Netherlands

In *Claimants v Malaysia (ECLI:NL:HR:2024:1145)*, the Dutch Supreme Court upheld the refusal of the enforcement of an award ordering Malaysia to pay \$15 billion under a perpetual lease agreement for parts of the former Sultanate of Sulu.

Geert Wilts, OSK Advocaten

The Dutch Supreme Court has upheld the Court of Appeal in The Hague's decision to refuse enforcement of a \$15 billion award obtained by the heirs of the Sultan of Sulu under an agreement made in 1878 for the perpetual lease of islands belonging to the former Sultanate (see [Legal update, Court of Appeal in The Hague refuses enforcement of \\$15 billion award against Malaysia](#)).

The Supreme Court upheld the Appeal Court's ruling on the basis that the matter was not subject to cassation review, as it did not concern a matter of legal unity or legal development.

In connection with that finding, the Supreme Court's Attorney-General considered the lower court ruling in detail and found that the question of whether a valid arbitration agreement had been entered into was subject to the laws of the country in which the award is rendered, as per article V(1)(a) of the New York Convention (NYC). Therefore, the Appeal Court had rightfully applied French law to assess the validity of the arbitration agreement. The Attorney-General further agreed with the Appeal Court that the arbitration agreement was unenforceable because "her Majesty's Consul General in Brunei", to which disputes were to be submitted under the arbitration agreement, no longer existed.

The Attorney-General further considered that a party could only be held to waive its right to dispute the tribunal's jurisdiction if it raised a defence on the merits without disputing jurisdiction at the same time. Multiple communications from the respondent state and its lawyers, including a settlement offer, were held not to include a defence on the merits.

The Attorney-General further found that the setting aside of the appointment of the arbitrator by the Spanish courts was a reason to refuse enforcement based on article V(1)(d) of the NYC.

However, the Attorney-General concluded that the Appeal Court had been wrong to refuse enforcement on the basis that the French courts had suspended the award. The suspension of an award was a ground to refuse enforcement under article V(1)(e) of the NYC, but not under Dutch law. Therefore, the Appeal Court could not refuse enforcement on this basis in view of article VII(1) of the NYC. However, given the lack of a valid arbitration agreement and the fact that Malaysia had not waived its right to dispute jurisdiction, this alone did not lead to the Appeal Court's decision being overturned.

Case: *Claimants v Malaysia (ECLI:NL:HR:2024:1145)* (6 September 2024).

END OF DOCUMENT