

# Dutch court sets aside ICC award holding that underlying agreement was influenced by corruption (Court of Appeal in The Hague)

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In *Bariven S.A. v Wells Ultimate Service LLC* (ECLI:NL:GHDHA:2019:2677), the Court of Appeal in The Hague set aside an International Chamber of Commerce (ICC) award ordering Bariven, a subsidiary of Venezuelan state oil and gas company PDVSA, to pay about USD 12 million to Wells for the purchase of propulsion engines under an agreement held to have been procured through corruption.

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## Speedread

The Court of Appeal in The Hague has set aside an award, holding that an underlying agreement for the delivery of propulsion engines was procured through corruption.

On 11 December 2012, Bariven, a subsidiary of Venezuelan state oil and gas company PDVSA, entered into an agreement with Texas company, Wells Ultimate Service LLC (Wells), for the delivery of two propulsion engines for a purchase price of about \$12 million. When Bariven failed to pay the purchase price, Wells initiated arbitration proceedings against it. Bariven claimed the agreement was procured through corruption. On 23 March 2018, the tribunal granted Wells' claim, together with costs and interest, ruling that Bariven had failed to provide clear and convincing evidence of corruption in winning the bid.

Before and after the arbitration proceedings, a person related to Wells, (X), and several former Bariven employees became suspects in criminal proceedings in the US relating to corruption at Bariven. In May 2019, some of the suspects in the US criminal proceedings were convicted.

In July 2018, Bariven filed an application to set aside the award at the Court of Appeal in The Hague. The court ruled that the purchase agreement was procured through corruption and set aside the award.

It held that the prohibition of corruption is so fundamental that no procedural requirements could justify giving effect to the award. The court did not give any convincing basis for this holding which is said to be untenable because there is no general rule in the Netherlands that corruption automatically overcomes any procedural obstacles. Therefore, the court has likely overreached in this case, making the decision rather vulnerable to overturning by the Supreme Court. (*Bariven S.A. v Wells Ultimate Service LLC* (ECLI:NL:GHDHA:2019:2677) (22 October 2019).)

## Background

When an arbitration has its seat in the Netherlands, Article 1065(1)(e) of the *Dutch Civil Procedural Code* (DCPC) (*Wetboek van Burgerlijke Rechtsvordering*) provides that an award will be set aside if it violates public order. A violation of public order will only occur if the contents or performance of an award violates a mandatory law of such fundamental nature that complying with it cannot be prevented by limitations of procedural law (*Dutch Supreme Court 21 March 1997, Eco Swiss v Benetton 8850 (R96/57 HR) (Dutch Supreme Court) ECLI:NL:HR:1997:AA4945 (21 March 1997)*). Due to the general interest in effective arbitral justice, state courts can only intervene in extraordinary examples (*Dutch Supreme Court 17 January 2003, IMS v Mopsaf-IR Co1/301HR (Dutch Supreme Court) ECLI:NL:HR:2003:AE9395 (17 January 2003)*).

Pursuant to Article 1065a(1) of the DCPC, a state court ruling on a claim to set aside an arbitral award may suspend the setting aside proceedings and refer the case back to arbitration to allow the tribunal to rectify the ground to set aside the award or to take other measures.

## Facts

Texas company Wells Ultimate Service LLC (Wells) and its ultimate beneficiary, a Texas incorporated trust, were established in May 2012. Officials of Wells and its ultimate beneficiary are the son and brothers-in-law of (X). In June 2012, Wells submitted an application to be approved as vendor of Bariven, a subsidiary of Venezuelan state oil and gas company PDVSA. In the application, Wells provided false information regarding among other things its equity and its ultimate beneficiary. Wells was approved as a temporary vendor immediately, allowing it to participate in Bariven vendor bidding panels and was awarded fourteen contracts, partly in competition with vendors related to X. Bariven was Wells' sole customer.

One of the contracts awarded to Wells concerned the delivery of two propulsion engines for a drilling rig. On 11 December 2012, Bariven entered into an agreement with Wells for the delivery by Wells of two propulsion engines to Bariven for a purchase price of almost \$12 million. PDVSA's general terms and conditions applied to the purchase agreement. These included a choice of Dutch law and International Chamber of Commerce (ICC) arbitration in The Hague.

The propulsion engines were manufactured by Aker Solutions in Norway and delivered by Wells to Bariven in June 2014. Bariven did not pay the invoice subsequently sent to it by Wells.

In December 2015, X became one of the main suspects in a US criminal investigation into bribery related to contracts awarded to Bariven and other criminal offences. Numerous former employees of Bariven were also suspects. X and several other suspects pleaded guilty.

Wells initiated arbitration proceedings against Bariven for payment of the purchase price for the propulsion engines. Bariven disputed the claim and filed a counterclaim of almost \$9 million for overpricing on both the propulsion engines, also one of Bariven's five arguments to substantiate its claim that corruption took place, as well as overpricing of multiple other agreements with Wells. On 23 March 2018, the award was rendered. The tribunal ruled that it lacked jurisdiction to rule on the counterclaim by Bariven insofar as it related to other agreements than the propulsion engines agreement. On the propulsion engines agreement, it ruled, amongst other things, that Bariven failed to provide clear and convincing evidence of corruption. The arbitral tribunal awarded Wells' claim for payment of \$12 million, plus costs and interest.

After the award was rendered, in April 2018, a special agent of the US Homeland Security Investigations filed a sworn statement in the criminal case, stating amongst other things, that companies of X made several significant payments to Bariven employees and that they were requested to only include certain specific companies in the vendor bidding panels. For instance, a former employee of Bariven (D) would have received around \$3.8 million in bribes. In May

2019, some of the suspects in the US criminal proceedings were convicted for their role in corrupt practices. The criminal proceedings against the other suspects are ongoing.

In July 2018, Bariven filed an application to set aside the award at the Court of Appeal in The Hague, arguing that the agreement had been procured through corruption. Further written submissions followed, in which Wells also requested the court to suspend the setting aside proceedings and refer the matter back to the tribunal, while Bariven requested the court to suspend the proceedings for one year pending the developments in several criminal proceedings. Enforcement proceedings in Portugal were also suspended pending the outcome of the enforcement proceedings in the Netherlands.

## Decision

The Court of Appeal in The Hague set aside the award, holding that the agreement for the delivery of the propulsion engines was procured through corruption.

First, the court assessed whether the award was to be set aside on the grounds that the contents of the award violated public order. The court ruled that the standards of the rule of law preclude legal effect being given to an agreement that is procured through corruption. This is a fundamental principle of the Dutch legal order that equates to a mandatory law of such fundamental nature that compliance with it cannot be precluded by the limitations of procedural law. Therefore, an award that gives legal effect to an agreement that is procured through corruption can be set aside for violation of public order.

Turning to the case at hand, the court ruled that it had to assess whether:

- The purchase agreement between Bariven and Wells was procured through corruption.
- The purchase agreement would not, or not under the same conditions, have been entered into without the corruption taking place.

The principle that setting aside proceedings may not be used as a disguised appeal is to be seen as a limitation of procedural law that cannot stand in the way of compliance with the fundamental rule prohibiting corruption. In other words, the interest of effective arbitral justice cannot contravene the interest of preventing corruption. Therefore, the court independently assessed whether the purchase agreement was procured through corruption, on the basis of facts taken into account by the tribunal, as well as facts that emerged later. The court also took into account the documents and arguments of Bariven regarding the purchase invoice by Wells and the five bids in the bidding procedure for the propulsion engines. It did so even though the tribunal had only taken these into account when they were submitted in the arbitration after a procedural order for Bariven to produce the documents in support of Bariven's overpricing argument.

The court then ruled that there were strong indications that the purchase agreement was procured through corruption for the following reasons:

- Bariven employees, including those involved in awarding contracts to Wells, including the propulsion engines contract, accepted bribes from companies of X.
- X will likely have gained advantages from contracts awarded to Wells.

- Without the involvement of bribed Bariven employees, it is inconceivable that Wells would have been approved as vendor of Bariven and included in vendor bidding panels. Even though Wells had only existed less than a month, it was immediately approved as vendor and was awarded fourteen contracts.
- Wells was not a normal company as it did not have an office, employees or other clients apart from Bariven and its profit margins were exactly 5% each year.
- The vendor bidding panel for the propulsion engines contract was composed by one of the employees of Bariven who received bribes from X and six out of eleven vendors on this panel were related to X.
- All five bids for the delivery of the propulsion engines were submitted by companies related to X, the bids had the exact same product description (including typographical errors) and the bids showed a remarkable numerical pattern.
- Three out of five Bariven employees that approved Wells' bid for the propulsion engines accepted bribes from X.
- The course of events in the conclusion of the propulsion engines agreement matched the pattern of corruption established in the US criminal case.
- Although Aker Solutions manufactured the propulsion engines, Wells failed to provide an invoice by Aker Solutions in the arbitration and instead submitted a redacted purchase invoice without the name of the supplier and listing Wells' president (B), as buyer.

The court bypassed the burden of proof set by the tribunal, ruling that persons and companies that are guilty of corruption will, generally, do everything possible to hide such corruption. Also, although Wells failed to provide any substantive explanation for the inconsistencies, the court ruled that there was sufficient evidence to conclude that the propulsion engines agreement was procured through corruption.

The fact that Wells supplied propulsion engines and that these were deployed by PDVSA was irrelevant, as it was not up to the court to determine the consequences of the purchase agreement being null and void.

In light of the court's conclusions, it set aside the award for violation of public order.

The court dismissed Wells' request to refer the matter back to the tribunal pursuant to Article 1065a(1) of the DCPC. According to the court, that would be contradictory to the legislative history of that Article and would not be effective as the court already ruled that the purchase agreement was procured through corruption. As Bariven's claim to set aside the award only concerned the claim by Wells being awarded the propulsion engines agreement, the court did not set aside the tribunal's order ruling that it lacked jurisdiction to hear Bariven's counterclaim insofar as it concerned other agreements.

In light of this outcome, the court did not address the other grounds for setting aside the award asserted by Bariven and Bariven's request to suspend the proceedings.

## Comment

The Court of Appeal in The Hague held that the prohibition of corruption is of such fundamental nature that no rule of procedure could justify giving effect to the arbitral award. The court has not given any convincing basis for that consideration and it seems to be untenable. After all, the very ground on which the setting aside of the arbitral award is based (violation of public order) requires certain procedural requirements to be met in order to succeed, including, for instance, the requirement that the setting aside claim is lodged within three months of the arbitral award or of the

service of leave to enforce (*Article 1064a(2), DCPC*). Even though that particular procedural requirement may have been met in this case, it follows clearly from the Dutch Arbitration Act that there is no general rule in the Netherlands that corruption automatically overcomes any procedural obstacles. Therefore, the court has likely overreached in this case, making the decision rather vulnerable to overturning by the Supreme Court.

Furthermore, although there are strong indications of corruption at the centre of this matter, it is remarkable that the court, after confirming that setting aside proceedings are not to be treated as disguised appeal proceedings, effectively overturned the ruling of the tribunal on a number of aspects. These aspects include the primary finding regarding corruption, the burden of proof set by the tribunal and the tribunal's decision on how to assess the evidence.

As the court refused to refer the case back to arbitration, the outcome (subject to further appeal to the Supreme Court) is that the parties will be left with an agreement that is null and void while no consideration has been paid for the engines that have been delivered. The court did not indicate where the parties should now bring any claim that may result from nullifying the agreement.

Lastly, the judgment may encourage parties who are dissatisfied with an award to bring allegations of corruption, fraud and other allegations asserted to be of such fundamental nature that complying with them cannot be precluded by limitations of procedural law in enforcement or setting aside proceedings, claiming that the state courts are to address these allegations in full even if they may already have been examined in the arbitration.

## Case

*Bariven S.A. v Wells Ultimate Service LLC (ECLI:NL:GHDHA:2019:2677) (22 October 2019).*

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