

Appeal Court in The Hague rejects application to set aside award for consolidation

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In *Bariven v Surpass (ECLI:NL:GHDHA:2021:304)*, the Appeal Court in The Hague dismissed an application to set aside an award in which the tribunal ruled on consolidated claims.

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The Appeal Court in The Hague has dismissed an application by PDVSA subsidiary Bariven to set aside an award in which the tribunal ruled on consolidated claims in favour of Chinese company Surpass.

The setting aside application concerned a May 2019 award ruling that claims by Surpass under 26 different purchase contracts (Contracts) could be decided in one arbitration, and largely awarding those claims. The tribunal dismissed Bariven's counterclaims relating to the Contracts and ruled that it lacked jurisdiction to deal with counterclaims that did not relate to them. Even though, in the arbitration, Bariven agreed to consolidated proceedings only if its entire counterclaim was made part of the proceedings, the tribunal consolidated the proceedings on a different basis, ruling that Bariven had implicitly agreed to consolidation when entering into 26 similar contracts.

Addressing the question whether the tribunal violated its mandate, the court ruled that it must only exercise a limited review of whether the tribunal could rule on the claims under the Contracts in a consolidated arbitration. The court emphasised that, according to the applicable arbitration rules, the tribunal was allowed to rule on claims under different contracts in a single arbitration if it was prima facie satisfied that the arbitration agreements were compatible and that the parties agreed on the claims being decided in one arbitration. The court ruled that Bariven's argument that the contracts were concluded over several years, with different ultimately interested parties during that time, was an insufficient ground to set aside the award. That the parties later made an umbrella agreement that any claims should be filed in one arbitration under that agreement, did not mean that the parties expressly agreed not to do so when concluding the Contracts. The court also ruled that, even if the tribunal violated its mandate by ruling on the consolidated claims, this was still an insufficient ground to justify setting aside the award, as Bariven had not indicated how and why it had an interest in the claims being determined in separate proceedings.

The court further ruled that, insofar as the arbitration in which claims are consolidated is subject to rules on setting aside based on the lack of a valid arbitration agreement or violation of public order, it cannot be held on that basis alone that the tribunal incorrectly applied the arbitration rules on consolidation, so that this also did not justify setting aside the award.

Case: *Bariven v Surpass (ECLI:NL:GHDHA:2021:304)* (2 March 2021).

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