

The Hague District Court upholds USD44 million arbitral award in favour of Merck

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

Legal update: case report | Published on 01-Jul-2021 | The Netherlands

In *Republic of Ecuador v Merck (ECLI:NL:RBDHA:2021:6069)*, the District Court in The Hague upheld an arbitral award ordering Ecuador to pay USD44 million to pharmaceutical company Merck for breach of a bilateral investment treaty.

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The District Court in The Hague has rejected Ecuador's application to set aside 2018 and 2020 awards from the Permanent Court of Arbitration in The Hague, ordering Ecuador to pay Merck USD24 million in damages, USD2.5 million in arbitral costs and USD17.5 million for Merck's legal fees. The damages awarded concerned payments made by Merck under Ecuadorian judgments awarding Ecuadorian company PROPHAR damages following the failed sale of a factory in 2003.

The court found that it had jurisdiction to rule on Ecuador's set aside application as the seat of the arbitration was The Hague and the arbitration commenced before 1 January 2015 (in contrast to the appeal courts that have jurisdiction only for arbitrations commenced from 1 January 2015).

First, the court ruled that there was a valid arbitration agreement arising out of the 1993 USA-Ecuador bilateral investment treaty (BIT). It rejected Ecuador's argument that the negotiations between Merck and PROPHAR concerned a non-competition clause, which is not considered an investment under the BIT, because this condition was part of the factory sale process that did qualify as an investment. The denial of justice argued by Merck in the arbitration qualified as a potential breach of the guarantee of fair and equitable treatment under the BIT.

The court then turned to Ecuador's assertion that the tribunal violated its mandate by incorrectly applying the burden of proof for Merck to evidence that the Extraordinary Action for Protection (EPA), with its associated access to the Ecuadorian Constitutional Court whose procedures Merck had not exhausted, did not provide a reasonable possibility of effective redress against the impugned Ecuadorian judgments. The court did not assess whether the tribunal's finding on whether a party could obtain financial compensation through an EPA caused Merck to meet its burden of proof, as the tribunal took into account other factors on this point, including that Merck filing an EPA may only have made matters worse. The court also ruled that the tribunal did not violate its mandate by assessing procedural aspects of the Ecuadorian litigation.

The court further ruled that the award was properly substantiated and that there was no violation of due process.

Although the judgment is subject to appeal, it confirms that Dutch courts are mindful not to treat proceedings to set aside arbitral awards rendered in the Netherlands as de facto appeal proceedings.

Case: *Republic of Ecuador v Merck (ECLI:NL:RBDHA:2021:6069)* (16 June 2021).

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