RULING FROM THE DUTCH SUPREME COURT, 16 JULY 2021: BARIVEN/WELLS DUTCH SUPREME COURT ASSESSES THE QUALIFICATION OF DECISIONS AS OBITER DICTA[1]

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I. BACKGROUND OF THE CASE

This case deals with a dispute between Texan company Wells Ultimate Service LLC («Wells») and the Venezuelan company Bariven S.A. («Bariven»), which is a subsidiary of Venezuelan state oil and gas company Petróleos de Venezuela («PDVSA»). On 11 December 2012, Wells and Bariven concluded an agreement for the sale and purchase of two propulsion engines (the so-called «top drives») that are being used at drilling platforms (the «Agreement»). The purchase price for the top drives was

1. ECLI:NL:HR:2021:1171.

USD 11,732,456.14 (the «Purchase Price»). The Agreement was governed by Dutch law and provided for ICC arbitration seated in The Hague, the Netherlands[2].

After Wells delivered the top drives in June 2014, Bariven failed to pay the Purchase Price, despite several demands by Wells. Wells consequently initiated arbitration proceedings against Bariven in March 2016 principally claiming payment of the Purchase Price. Bariven defended itself by arguing that the Agreement was concluded under the influence of corruption[3] and should therefore be declared null and void or should be nullified.

In response to this corruption defence, Wells presented an alternative claim stating that, should the Agreement be annulled or be declared null and void, Bariven was to refund the economic value of the top drives. The economic value was, according to Wells, equal to the Purchase Price. Bariven also brought forward a counterclaim in which it reclaimed part of the Purchase Price because the top drives would have been overpriced.

The arbitral tribunal rendered an award in March 2018 in which it awarded Wells' principal claim and ordered Bariven to pay the Purchase Price (the «Award»). The arbitral tribunal rejected Bariven's defence that the Agreement had been procured by means of corruption due to lack of evidence.

In an additional section (E) of the Award (see below under 3), which the arbitral tribunal itself qualified as *obiter dictum*, it was held that, in the event that the Agreement was found to have been procured by means of corruption, Bariven would have had to return the top drives to Wells. As it would not have been possible to return the top drives, Bariven would have had to compensate Wells in an amount equal to the Purchase Price.

II. COURT OF APPEAL OF THE HAGUE: ANNULMENT BASED ON VIOLATION OF PUBLIC POLICY

Bariven initiated setting aside proceedings before the Court of Appeal in The Hague alleging, *inter alia*, that the Award violated public policy by enforcing an agreement procured by means of corruption [Art. 1065(1)(e) of

2. As per the general terms and conditions of PDVSA that applied to the Agreement.
3. In the proceedings before the Supreme Court, the corruption aspect of this case did not play an essential role and will therefore not be addressed any further. For a more extensive description of the corruption aspect, see Chapter 2 of the judgment of the Court of Appeal: Court of Appeal The Hague, Judgment, 22 October 2019, ECLI:NL:GHDHA:2019:2677.

the Dutch Code of Civil Procedure («DCCP»)]. Bariven did not challenge the considerations contained in the Award labelled by the arbitral tribunal itself as *obiter dictum*.

As a basic principle under Dutch law, setting aside proceedings cannot operate as a *de facto* appeal of an arbitral award. Courts should only set aside an award when there is a clear violation of public policy[4]. In this context, the Court of Appeal held that the aforementioned basic principle is a restriction of procedural nature. It should therefore not operate to prevent the Court from exercising control of compliance with a fundamental rule of law, such as the prohibition of corruption[5]. If an award attributes legal consequences to an agreement that violates public policy, it should be possible for a court to set it aside. In her advice to the Supreme Court in the subsequent cassation proceedings, the Advocate General at the Supreme Court shared this view, which is a useful aspect to consider for parties attempting to set aside arbitral awards in the Netherlands pursuant to Art. 1065(1)(e) DCCP[6].

The Court of Appeal then assessed whether the Agreement had been obtained through corruption. In doing so, it relied on both the facts established by the arbitral tribunal in the arbitration and new facts that occurred after the Award was rendered. The Court of Appeal held that there were indeed strong indications that the Agreement had been procured by corruption. It therefore set aside the Award[7]. In its assessment, the Court of Appeal did not address the considerations contained as *obiter dicta* in the Award.

III. DECISION OF THE SUPREME COURT: NO *OBITER DICTUM* AND NO ANNULMENT

Wells lodged an appeal in cassation before the Dutch Supreme Court. Amongst others, Wells argued that, based on the *obiter dictum* of the Award, Bariven was still obliged to pay the Purchase Price even if the Agreement was found to have been procured by corruption.

4. Opinion of Advocate General R.H. de Bock, 11 December 2020, ECLI:NL:PHR:2020:1176, para. 4.20, who refers to inter alia Supreme Court, Judgement, 12 April 2019, ECLI:NL:HR:2019:565 (*Republiek Ecuador/Chevron c.s. II*), para. 4.3.2.
5. Court of Appeal of The Hague, Judgement, 22 October 2019, ECLI:NL:GHDHA:2019:2677, para. 5.6.
6. Opinion of Advocate General R.H. de Bock, 11 December 2020, ECLI:NL:PHR:2020:1176, paras. 4.21-4.22.
7. Court of Appeal The Hague, Judgement, 22 October 2019, ECLI:NL:GHDHA:2019:26775, para. 5.14.

1. OPINION OF THE ADVOCATE GENERAL[8]

The opinion of the Advocate General is an interesting read as it thoroughly describes to what extent a Court in setting aside proceedings can independently assess an award[9]. The Advocate General concluded that, if there are strong indications that an award violates public policy, a Court must set aside the award based on Art. 1065(1)(e) DCCP. Notably, the Advocate General found that this also applies to points which are already assessed in the arbitral award. When dealing with possible violations of public policy, setting aside proceedings would, in the view of the Advocate General, allow for an extensive control of the arbitral tribunal's decision.

Notably, however, the key question in cassation was whether the considerations that the arbitral tribunal labelled as *obiter dicta* independently supported the operative part of the Award. The Advocate General considered in this respect that the arbitral tribunal merely admitted Wells' primary claim for payment of the Purchase Price and did not consider Wells' alternative claim for compensation of the value of the top drives[10]. According to the Advocate General, the considerations on the *alternative* claim were contained within the *obiter dictum* and hence did not independently support the operative part of the Award. The Court of Appeal, in the Advocate General's view, therefore rightly set aside the award after finding that the Agreement had been obtained through corruption.

2. SUPREME COURT JUDGMENT

The Supreme Court delivered a remarkably short judgment that failed to address either the issue of corruption or the public policy arguments. The Supreme Court only considered whether the *obiter dictum* of the Award supports its operative part independently. As a starting point, the Supreme Court found that it is not decisive in this respect that the arbitral tribunal itself qualified the considerations on Wells' alternative claim as *obiter dictum*[11]. Instead, according to the Supreme Court, what needs to be assessed is how the those considerations (regardless of whether the arbitral tribunal had labelled them

8. In Supreme Court proceedings in the Netherlands, the Advocate General at the Supreme Court provides an opinion to the Supreme Court in the form of an advice before the latter renders a judgment (Art. 393(6) DCCP).
9. Opinion of Advocate General R.H. de Bock, 11 December 2020, ECLI:NL:PHR:2020:1176, Section 4.
10. *Ibid.*, paras. 5.8-5.9.
11. Supreme Court, Judgement, 16 July 2021, ECLI:NL:HR:2021:1171, para. 3.1.4. The Supreme Court refers to Supreme Court, Judgement, 29 April 2011, ECLI:NL:HR:2011:-BQ0713, para. 3.5.

as *obiter dicta*) relate to the operative part of the Award. This is in line with the opinion of the Advocate General[12].

The Supreme Court subsequently conducted a thorough linguistic assessment of the Award to assess whether the considerations in the *obiter dictum* independently support the operative part of the Award. It took the following facts as a basis for this assessment[13]:

- Both Wells' primary and alternative claim are set out in Chapter 9 of the Award, titled «Relief sought in the principal claim»;
- Bariven's counterclaim is discussed in Chapter 10 of the Award, titled «Relief sought in the counterclaim»;
- The assessment of both claims presented by Wells is provided in Chapter 13 of the Award («Assessment of the principal claim»)::
  - In Section D («Interim conclusion»), the principal claim of USD 11,732,456.14 was awarded to the claimant as Bariven was obliged to perform the contract.
  - In Section E («Further observation»), the *obiter dictum* was introduced : Wells' claim would have been granted even if the Agreement would have been subject to annulment, since Bariven would, in that case, be under the obligation to reimburse Wells of the economic value of the top drives (which was to be set at an amount equal to the Purchase Price).
- In the operative part of the Award, Bariven was ordered to pay USD 11,732,456.14.
- Bariven did not challenge the *obiter dictum* contained within Section 13 (E) of the Award.

The Supreme Court hence departs from the Advocate General's advice. The difference primarily lies in the explanation of the term «principal claim». According to the Supreme Court, this term applies to both Wells' primary and alternative claims. This can be derived from the titles of the different chapters in the Award. The Supreme Court explicitly considers that the term «principal claim» captures both Wells' primary (or «principal») claim and its alternative claim and considers that the term «principal» is used to distinguish Wells' claims from the «counterclaim» presented by Bariven. In Chapter 13, the arbitral tribunal assessed the entire «principal claim» and found it to have merit under both Wells' primary (Section 13 D) and alternative (Section 13 E) claims[14].

12. Opinion of Advocate General R.H. de Bock, 11 December 2020, ECLI:NL:PHR:2020:1176, para. 5.7.
13. Supreme Court, Judgement, 16 July 2021, ECLI:NL:HR:2021:1171, paras. 3.1.2-3.1.3.
14. Supreme Court, Judgment, 16 July 2021, ECLI:NL:HR:2021:1171, para. 3.1.5.

Under these circumstances, the Court of Appeal could only set aside the Award if Bariven had also successfully challenged Section (E) of Chapter 13. As Bariven did not do so, the Court of Appeal was not in a position to set aside the Award. The Supreme Court therefore reversed the judgment of the Court of Appeal and dismissed Bariven's claim for annulment of the Award, which meant that the Award was confirmed.

IV. COMMENTARY

Although this decision, including the Advocate General's opinion, is interesting in many respects, we will confine ourselves to a few reflections that deserve specific attention. A first observation is that the impression that remains from this case is that the Supreme Court in its (linguistic) assessment of the file, found that the Award should be upheld. Apart from the fact that this is in line with the pro-arbitration stance of Dutch courts, it also implies that the Supreme Court found that, in this case, it should not intervene by annulling the decision. This would have forced Wells to initiate new proceedings while it was clear from the Award that its alternative claim was found to have merit by the arbitral tribunal as well. As the term «principal claim» was not used in a consistent manner in the Award (we point out to consideration 15.1 of the Award as cited in para. 5.8 of the Advocate General's advice), the Supreme Court could quite well have drawn the opposite conclusion based on an equally linguistic assessment of the Award (as the Advocate General did). The Supreme Court apparently deemed this to be undesirable.

Secondly, parties initiating annulment proceedings before Dutch courts should assess which considerations independently support the operative part of an award. Accordingly, parties are advised to challenge all of these considerations. The Supreme Court's ruling shows that courts in setting aside proceedings have the authority to independently assess which considerations support the operative part of an award and to depart from an arbitral tribunal's own assessment in that respect.

In addition, arbitrators are reminded that it can be useful to address alternative claims, even if a claim is already awarded on the basis of the principal claim. Equally, it can prove useful to award a claim on more than one ground if the arbitral tribunal would not be entirely familiar with the compatibility of its assessment with the public policy at the place of the seat of arbitration. This may make the award less vulnerable to setting aside proceedings and hence strengthen the finality of awards.

Third, practitioners are reminded that the Court of Appeal of The Hague found that it was in a position to assess whether the Agreement was procured by means of corruption. Even though the Supreme Court did not address the

public policy element of the case, the Advocate General extensively set out that the Court of Appeal was authorised to do so. The Advocate General also made the general remark that if there are strong indications that public policy is violated, a Court must set aside an award on the basis of Art. 1065(1)(e) DCCP. This is in line with earlier Supreme Court decisions[15].

15. The Supreme Court has, in earlier cases, decided that only in extraordinary instances (sprekende gevallen) a court in setting aside proceedings can intervene based on public policy, see Supreme Court, Judgement, 12 April 2019, ECLI:NL:HR:2019:565 (Republiek Ecuador/Chevron c.s. II), para. 4.3.2 and Supreme Court, Judgement, 24 April 2009, ECLI:NL:HR:2009:BH3137 (IMS/Modsaf II), para. 4.3.1. See also Opinion of the Advocate General R.H. de Bock, 11 December 2020, ECLI:NL:PHR:2020:1176, para. 4.20. The question of whether the prohibition of corruption is a matter of public policy in the sense of Art. 1065(1)(e) was not in dispute in this case according to the Advocate General (see para. 4.19 of the Opinion).