

# DUTCH SUPREME COURT

## CIVIL CHAMBER

**Number** 20/00207  
**Date** 16 July 2021

## JUDGMENT

In the case of

WELLS ULTIMATE SERVICE LLC,  
established in Houston, Texas, United States of America,  
Plaintiffs,  
Hereinafter referred to as Wells,  
lawyers: B.T.M. van der Wiel and R.R. Verkerk,

against

BARIVEN S.A.,  
established in Caracas,  
Venezuela, REPRESENTATIVE,  
hereinafter referred to as  
'Bariven',  
lawyer: D.M. de Knijff.

## 1. Process

For the course of the proceedings in the factual instances, the Supreme Court refers to:

- a. The arbitral award in case 21754/FS of the arbitral tribunal in The Hague of 23 March 2018 (hereinafter: the arbitral award);
- b. The judgment in the case 200.244.714/01 of the Court of Appeal of The Hague of 22 October 2019. Wells has appealed against the judgment of the Court of Appeal.

Bariven has submitted a defence for rejection.

The case was presented for the parties by their lawyers, and for Wells also by J.H.G. Hordijk.

The opinion of Advocate General R.H. de Bock is directed to dismiss the appeal in cassation. Wells' lawyer responded to that conclusion in writing.

## 2. Starting points and facts

2.1 In cassation, the facts and circumstances mentioned in the conclusion of the Advocate General under 1.1-1.21 may be assumed. In so far as relevant for the following, these come down to the following.

- (i) Bariven is a company incorporated under Venezuelan law. It is a subsidiary of Petróleos de Venezuela S.A. ('PDVSA'), Venezuela's state oil and gas company. Bariven handles the procurement of materials, including parts and equipment, required by other PDVSA subsidiaries for production and refining activities.
- (ii) Wells is a company incorporated in the State of Texas.
- (iii) Wells and Bariven entered into an agreement on 11 December 2012 concerning the sale and delivery by Wells to Bariven of two large engines (so-called *top drives*, hereinafter: drive engines) used on a drilling platform to drive the drilling rig (hereinafter: the purchase agreement). The purchase price was USD 11,732,456.14. The purchase agreement is subject to PDVSA's general terms and conditions which provide for the applicability of Dutch law and arbitration according to the arbitration regulations of the *International Chamber of Commerce* 2012, by an arbitral tribunal consisting of three members and with The Hague as place of arbitration.
- (iv) Wells delivered the drive engines to Bariven in June 2014. Bariven has failed to pay the purchase price of the drive engines, despite summonses from Wells.
- (v) On 11 March 2016, Wells commenced the arbitration proceedings against Bariven which are the subject of the present annulment proceedings. In the arbitration proceedings, Wells claimed to have ordered Bariven to pay USD 11,732,456.14. Bariven's defence against the claim was - in so far as relevant in cassation - based on the ground that the purchase agreement is null and void pursuant to Article 3:40 of the Dutch Civil Code because it was concluded under the influence of corruption.
- (vi) In the arbitral award, the arbitral tribunal upheld Wells' claim for payment of USD 11,732,456.14.

- 2.2 In these proceedings, Bariven - to the extent relevant in cassation - claimed the annulment of the arbitral award on the basis of art. 1065, paragraph 1, under e, DCCP (contrary to public order). To this end, Bariven argued that the arbitral award confirms and legitimises an agreement that came into being under the influence of corruption.
- 2.3 The court of appeal annulled the arbitration award, insofar as relevant in cassation.

### 3. Evaluation of the remedy

- 3.1.1 Part 1 of the plea submits that Wells emphasised, both in the arbitration proceedings and in the annulment proceedings, that, even if the contract were found to be invalid, Bariven would have to pay the amount claimed by Wells. It argues that the arbitral tribunal granted Wells' claim on two independently supporting grounds. After having allowed the claim on the basis of Bariven's contractual obligation to pay the purchase price of the engines, the arbitral tribunal considered that Wells' claim was also allowable if the purchase agreement was void or voidable, because in that case Bariven's obligation to rectify would amount to an amount equal to the purchase price. Bariven did not put forward any grounds for annulment against these considerations, which the arbitral tribunal described as *obiter dictum*. Bariven's claim for annulment is directed solely against the arbitral tribunal's finding that the contract is not null and void. By granting Bariven's claim for annulment nevertheless, the Court of Appeal has misjudged that an arbitral award that is based on two independently supporting grounds can only be annulled if successful grounds for annulment have been directed against both grounds, according to the section.
- 3.1.2 In the arbitration proceedings Wells claimed payment of USD 11,732,456.14 from Bariven. The basis for this claim was performance, consisting of payment of the purchase price and, in the event that the agreement was annulled, compensation for the value of the engines. The arbitral tribunal set out Wells' claim in Chapter 9 of the arbitral award, entitled '*Relief sought in the principal claim*'. In that chapter, it listed both bases on which Wells' claim rests. It set out Bariven's counterclaim in Chapter 10 of the arbitral award, entitled "*Relief sought in the counterclaim*". It then ruled in Chapter 13 of the arbitral award, entitled "*Assessment of the principal claim*", under D ("*Interim conclusion*"), that Wells' *principal claim* for payment of USD 11,732,456.14 was assignable on the basis that Bariven was obliged to perform the contract. It then concluded, in Chapter 13, under E ("*Further Observation*"), that the claim is also allowable if the purchase agreement is subject to annulment due to, inter alia, being contrary to public policy, and that in that case Bariven's obligation to pay compensation for not being able to return the goods would amount to an amount equal to the purchase price.
- In the operative part of the arbitration award, the arbitral tribunal ordered Bariven to pay USD 11,732,456.14.

- 3.1.3 Bariven has based its application for annulment on the fact that the content of the arbitral award is contrary to public policy because the arbitral award confirms and legitimises the purchase agreement when it was concluded under the influence of corruption. It did not put forward any grounds for annulment in respect of the part of the arbitral award in Section 13(E) relating to Bariven's obligation to make good any damage caused by the annulment of the purchase agreement on the grounds, *inter alia*, of public policy.
- According to, *inter alia*, its pleading memorandum and the transcript of the oral hearing in the annulment proceedings, Wells again took the position that, even if the agreement was found to be null and void, Bariven would have to pay the amount claimed by Wells. By way of rejoinder, Wells argued that Bariven's contention that it would not have to pay for the goods because the contract of sale was allegedly formed through corruption was rejected by the arbitral tribunal not only because Bariven had not been able to prove its contentions, but also because any annulment of the contract of sale cannot have the effect of allowing Bariven to keep the goods without paying any compensation to Wells.
- 3.1.4 To answer the question whether the considerations of the arbitral tribunal in Section 13(E) independently support its decision, it is decisive how these considerations, taken as a whole, relate to the decision in the operative part. The fact that the arbitral tribunal referred to these considerations as "*obiter dictum*" is not decisive in this respect.<sup>1</sup>
- 3.1.5 What has been stated above in 3.1.2 does not allow any other interpretation than that the considerations of the arbitral tribunal with regard to the undue payment as a basis for the obligation of Bariven to pay the amount of USD 11,732,456.14 claimed by Wells, concerns a ground that carries the dictum independently. The term '*principal claim*' has been used to refer to Wells' claim for payment of USD 11,732,456.14 and to distinguish it from Bariven's '*counterclaim*'. According to Chapter 9 of the arbitral award, the term covers both grounds put forward by Wells for that claim. In Chapter 13 of the award, the arbitral tribunal assessed Wells' claim ("*Assessment of the principal claim*") and found it to be allowable on both grounds. In the dictum, Bariven was ordered to pay an amount of USD 11,732,456.14 to Wells.
- 3.1.6 What has been considered above in 3.1.3 and 3.1.5 means that the Court of Appeal could only uphold Bariven's demand for annulment if Bariven had also - and successfully - put forward grounds for annulment against the considerations in the arbitral award that relate to Bariven's obligation to compensate the value of the delivered goods. By setting aside the arbitral award despite the lack of such grounds for annulment, the Court of Appeal has failed to recognise that these considerations independently support the decision of the arbitral tribunal in the operative part. The complaints directed at this issue are successful.

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<sup>1</sup> Cf. HR 29 April 2011, ECLI:NL:HR:2011:BQ0713, paragraph 3.5.

- 3.1.7 The Supreme Court may itself decide the matter. It follows from the foregoing that Bariven's claim for annulment must be dismissed.

#### **4. Decision**

The Supreme Court:

- sets aside the judgment of the Court of Appeal of The Hague of 22 October 2019;
- rejects Bariven's claim for annulment of the arbitral award;
- orders Bariven to pay the costs of the proceedings, which, until the present judgment, are estimated on the part of Wells:
  - at the court of appeal at € 27,274;
  - in cassation at € 7,802.07 for disbursements and € 2,600 for salary, increased by the statutory interest on these costs if Bariven has not paid them within fourteen days from today.

This judgment has been delivered by the Vice-President C.A. Streefkerk as chairman and the justices C.H. Sieburgh, H.M. Wattendorff, F.J.P. Lock and A.E.B. ter Heide, and pronounced in public by counsel M.J. Kroeze on 16 July 2021.

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# Signature of the judgment

ECLI:NL:HR:2021:1171

## Signatures

Versteeg, E.E.J.

A handwritten signature in black ink, appearing to be 'E.E.J. Versteeg', enclosed in a thin black rectangular border.

Kroeze, M.J.

A handwritten signature in black ink, appearing to be 'M.J. Kroeze', enclosed in a thin black rectangular border.