IN THE NAME OF THE KING

arrest

GERECHTSHOF DEN HAAG

Afdeling Civiel recht

Case number : 200.270.819/01

judgment of 2 March 2021

regarding

Bariven S.A.,
established in Caracas, Venezuela,
plaintiff,
Hereinafter referred to as: Bariven, lawyer:
M. Deckers in Amsterdam,

against

Surpass Commercial Corp. Ltd,
established in Beijing, People's Republic of China, defendant,
hereinafter referred to as: Surpass,
lawyer: D. Knottenbelt, Rotterdam.

This case concerns an arbitral award that decided on claims arising from various contracts between the parties, each of which contained its own/similar arbitration clause. Bariven claims not to have agreed to this adjudication in a single arbitration and for that reason seeks the annulment of the arbitral award.

1. The procedure

1.1. The procedure shows:
the writ of summons of 26 August 2019
the document containing the Bariven production documents, with productions 1 and 2A-H the response and cross-appeal for the provision of security, with productions 1-3
the response to the incident the judgment in incident of 7 July 2020
the record of the oral hearing of 7 January 2021, the pleadings submitted by both parties, and Mr Knottenbelt's letter of 1 February 2021 in response to the record.

1.2. At the oral hearing, the parties requested a judgment, which was (further) set for today.

2. The facts

2.1. Bariven purchased various goods from Surpass through 26 purchase agreements, on behalf of its affiliates, during the period 2011-2015. The

purchase agreements each contained an identical arbitration clause, which subjected all disputes under the respective agreement to arbitration according to the rules of the arbitration institute of the International Chamber of Commerce (IKK) in The Hague.

2.2. Article 9 of the applicable Arbitration Rules provided as follows:

"Multiple contracts

Subject to the provisions of Articles 6{3)-6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."

2.3. Article 6 of the Arbitration Rules, to the extent relevant, provided as follows:

"Effect of the Arbitration Agreement [...]

3 If [...j any party raises one or more pleas [...] concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question [...] of
. whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. [...] In particular [...] where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is prima facie satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.
The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas."

2.4. By application dated 24 November 2016, Surpass lodged an arbitration with the IKK against Bariven, seeking, inter alia, payment under the 26 sale agreements. Bariven responded that it had not agreed to arbitration of claims under all 26 purchase agreements in one arbitration (hereafter: consolidation), and only wished to agree to this subject to the treatment in the same arbitration of its (integral) counterclaim. The Secretary-General did not refer this matter to the court of the IKK on the basis of article 6 paragraph 3 of the arbitration regulations (above, 2.3). Subsequently, a single arbitral tribunal was appointed, consisting of three arbitrators. In the subsequent arbitration proceedings, Surpass did not agree to deal with Bariven's counterclaim insofar as it did not relate to the 26 purchase agreements under which it had itself commenced arbitration.

2.5. By arbitral award of 27 May 2019 (hereinafter: the arbitral award), the arbitral tribunal declared itself incompetent to rule on Bariven's counterclaim to the extent that it did not relate to the 26 purchase agreements. This meant that the condition under which Bariven had agreed to consolidation in the arbitration was not met. As to its jurisdiction to nevertheless try Surpass' claims under the 26 sale agreements on a consolidated basis, the arbitral tribunal considered that, for the sake of argument, it had to apply the criteria of Article 6(4) of the arbitration rules (above, 2.3). In this respect the arbitral tribunal considered in summary the following. The arbitration clauses in the 26 contracts are identical, and part of almost identical purchase agreements. The main, if not only, difference lies in the goods traded and the corresponding purchase prices. The claims concern general *issues of* fact and law between the same parties, under purchase agreements made under the same regulated bidding process, under the same general conditions, under the same applicable law, under the same *governmental Corporation* programme and within the same industry. From this it must be inferred, in the absence of facts to the contrary, that the 26 agreements are not only compatible with each other, but also that Bariven, when concluding them, agreed to deal with any disputes arising from several of them in one arbitration - the arbitral tribunal said. According to the arbitral tribunal, Bariven could not go back on this in the arbitration. The arbitral tribunal then largely upheld Surpass's claims under the 26 agreements and dismissed Bariven's counterclaim, insofar as it related to these agreements.

3. The dispute

3.1. Bariven claims that the arbitral award should be set aside due to the consolidation decision made therein. It argued that there was no valid agreement for (such) arbitration (article 1065 paragraph 1 sub a Rv), that the arbitral tribunal did not comply with the instructions given to it (article 1065 paragraph 1 sub c Rv) and that the arbitral award was contrary to public policy (article 1065 paragraph 1 sub e Rv).

3.2. Surpass put forward a defence.

3.3. The parties' contentions and defences will be dealt with below, insofar as relevant.

4. The rating

Article 1065 paragraph 1 sub c of the Code of Civil Procedure

4.1. As regards Bariven's position that the arbitral tribunal did not comply with the mandate given to it, the following applies. The question the arbitral tribunal faced, namely whether it could adjudicate the claims arising from the 26 purchase agreements in a consolidated manner, is a procedural question which in itself lends itself to review under article 1065 paragraph 1 sub c Rv. However, this review should be cautious. It may not go as far as giving your own assessment of the application of the relevant procedural rule, and that of the arbitral tribunal in its entirety. In addition, the test applied by the arbitral tribunal, namely the test that the court of appeal should have applied to the IKK, should not be interpreted as a test for the court of appeal.
if the matter had been brought before him - and this test itself is not disputed by Bariven - was itself marginal (Article 6(4) of the Arbitration Rules: *prima facie satisfied).*

4.2. Surpass refers to the *practical commentary* of the Secretariat of the IKK on the arbitration rules, according to which the consent to consolidation required by Article 6.4 of the arbitration rules may be given not only explicitly but also implicitly. According to this explanation, the (implicit) consent must be determined on the basis of objective factors. According to the explanatory memorandum, similarities between arbitration clauses in different contracts, between the same parties, may give /jr/ma *facie* indication of consent to consolidation.

4.3. Bariven submits that the consent of the arbitral tribunal assumed by its with consolidation is not evidenced in writing, and that therefore the opinion of the arbitral tribunal is contrary to Section 1021 of the Dutch Code of Civil Procedure, which stipulates that an agreement to arbitrate must be evidenced in writing (or electronic data). With this position, Bariven fails to recognise that submitting a dispute to arbitration *in a* zzcfee^f *manner* is something else than agreeing to consolidated treatment of disputes thus submitted to arbitration, in one single arbitration. Article 1021 Rv does not apply to this.

4.4. According to Bariven, the facts and circumstances on which the arbitral tribunal based its opinion that Bariven agreed to consolidation are not convincing, because the 26 purchase agreements were concluded over a period of years, with various underlying parties on its side. However, this position is of insufficient weight for the conclusion put forward by Bariven, in view of the assessment standard described above in 4.1 that the court of appeal must take into account (a cautious assessment of the *prima facie* assessment of the arbitral tribunal).

4.5. Bariven further argues that the parties consciously did not agree to a Master Agreement with dispute resolution for the 26 agreements (on the basis of which disputes from various agreements under the Master Agreement could then be jointly dealt with in one procedure, as Bariven evidently means), whereas they did for other agreements. In so far as

Bariven means with this that the "conscious" reason for not concluding master agreements for the 26 agreements was the wish not to agree on consolidation, it applies that it has not substantiated this position sufficiently. The Court of Appeal takes into account the undisputed circumstance that the mantei agreement that the parties did conclude dates from after (the entering into) the 26 agreements. Therefore, this later mantei agreement cannot in any case serve as a reference for the assessment of what was intended earlier with regard to consolidation with those 26 agreements. Above all, Bariven does not argue that it also raised this point of the (no) mantei agreement in the arbitration proceedings. The assessment made by the arbitral tribunal cannot be called defective because it did not include arguments that were not raised.

4.6. Bariven further points to Surpass's opposition on formal grounds to adjudication in arbitration of Bariven's counterclaims outside the 26 purchase agreements.
Like Surpass's right to refuse to agree to a more extensive treatment of counterclaims, Bariven considers that its right to refuse to agree to a more extensive treatment of claims in one arbitration (consolidation) should be respected. This position, however, fails to recognise that the arbitral tribunal's decision on consolidation is not based on the idea that the parties are not entitled to agree to arbitration under different contracts without agreeing (in advance) to consolidation, but on the view that in the present case, Bariven did agree to consolidation, and that it could not return to it in the arbitration. Surpass' position on the admissibility of the counterclaim in the arbitration, and the opinion of the arbitral tribunal on this, are beyond dispute.

4.7. Bariven did not contradict the significance of the explanation of the arbitration rules mentioned above in 4.2 and its usefulness in assessing the arbitral tribunal's award. Also, Bariven has not contradicted the facts and circumstances taken into account by the arbitral tribunal for its consolidation award (above, 2.5). An exception - in Bariven's view - applies only, perhaps, to the arbitral tribunal's assessment that "the main, if not only" difference between the 26 purchase agreements was in the goods traded and the purchase prices charged for them: Indeed, Bariven has argued in the present proceedings that on its side the underlying parties were also different for each contract. However, in the opinion of the Court of Appeal, this aspect is of insufficient weight (above, 4.4). Against this background, in the opinion of the Court of Appeal, it cannot be said that the arbitral tribunal has not complied with the assignment given to it.

4.8. For the sake of completeness, the Court of Appeal also considers that if a breach of contract in the sense intended by Bariven were to be assumed, it would not be sufficiently serious to be able to support the claim for annulment of the arbitral award (Section 1065(4) of the Dutch Civil Code). In response to Surpass' assertion that Bariven had no interest at all in litigating the disputes under the 26 purchase agreements in different arbitration proceedings, Bariven merely argued that the consolidation undertaken in spite of its non-agreement with it had impaired its autonomy, and that this was by definition serious. This position is incorrect. In reply to questions of the Court of Appeal during the oral proceedings, Bariven also argued that an interest in separate adjudication may consist of the possibility to appoint arbitrators specialised in the matter of that contract and/or to make specific procedural agreements, for instance about the taking of evidence. In so far as this position is intended as (further) substantiation of the seriousness of the shortcoming at issue, according to Bariven, the following applies. Bariven has not stated that specifically in respect of the 26 agreements there was an interest or desire to arrive at the separate appointments/procedure agreements it referred to. As far as procedural (agreements) are concerned, Bariven has not argued that within the arbitration procedure conducted, it would not have been possible to differentiate between (groups of) agreements, if this had been requested. Finally, it applies here again that Bariven did not raise its objections on this point in the arbitration proceedings themselves, while they are also not obvious, so that already for this reason it cannot be called serious that the arbitral tribunal did not take them into account.

Articles 1065 subsection Isnb a and subsection e Rv: valid arbitration agreement and public policy

4.9. A valid arbitration agreement was not lacking, nor is the arbitral award contrary to public policy. To the extent that the subject matter of consolidation is already covered by article 1065 paragraph 1 sub a and/or e Rv, in the present case all 26 agreements refer to IKK arbitration, and it cannot be said that the arbitral tribunal has incorrectly applied the rules for consolidation applicable to IKK arbitration (above, 4.1-7). This would not be compatible with the opinion that, in connection with the alleged lack of consent of Bariven to consolidation, a valid arbitration agreement was nevertheless lacking and/or the arbitral award is contrary to public policy.

4.10. Bariven has offered no specific facts to prove which, if proven, could lead to a different assessment. The court of appeal will dismiss the claim for annulment of the arbitration award, and order Bariven to pay the costs. The Court of Appeal has estimated the costs incurred by Surpass to date at €6,741 for the court registry fee and €11,002 for the lawyer's salary, totalling €11,743. The subsequent costs are estimated in the operative part of the judgment.

5. The decision

The Court

rejects the claim;

orders Bariven to pay the costs of the proceedings, estimated on the part of Surpass at € 11.743 to date and € 157 in legal costs for the lawyer, to be increased by € 82 if this judgment is not complied with within 14 days after notice has been given and service has subsequently been made of this judgment, and stipulates that these amounts must be paid within 14 days after the date of the judgment or, with regard to the amount of € 82, after the date of service, failing which these amounts shall be increased by the statutory interest as referred to in Section 6:119 of the Dutch Civil Code from the end of the 14-day period in question;

declares this judgment provisionally enforceable as regards the order on costs.

This judgment has been handed down by J.W. Frieling, M.T. Nijhuis and W.H. van Boom, and was signed and pronounced at the public hearing on 2 March 2021 by J.E.H.M. Pinckaers, justice of the court, in the presence of the Registrar.