

Does an award enforcing a contract procured through bribery violate public policy? The Dutch perspective

Does an award enforcing a contract procured through bribery violate public policy? A first look at the emerging Dutch perspective

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On 22 October 2019, in the case of *Bariven S A v Wells Ultimate Service LLC*, The Hague Court of Appeal set aside an international arbitration award on the ground that enforcing a contract procured through corruption violates Dutch public policy.^[1] The judgement represents a noteworthy addition to the growing line of cases dealing with allegations of corruption in international commercial arbitration set-aside proceedings. This short article presents the background of the case and outlines some initial thoughts concerning its significance.

Factual background^[2]

The parties

Bariven S A ('Bariven'), the petitioner in the set aside proceedings, is a subsidiary of the Venezuelan state-owned energy company *Petróleos de Venezuela* ('PDVSA'). Bariven is primarily responsible for procuring equipment for producing and refining oil and gas.

Wells Ultimate Service LLC ('Wells'), the defendant in the set aside proceedings, was incorporated in Texas in May 2012. The company is reported to have close ties with the Venezuelan businessman Roberto Enrique Rincón Fernández.^[3] Wells is run by the son and brother-in-law of Mr Rincón, and ultimately owned by another brother-in-law. Wells is registered at the same address as three other entities associated with Mr Rincón, and has the same registered agent as 25 other entities associated with him. Its annual reports disclose a number of related party transactions with entities that are linked to Mr Rincón. In addition, the reports showed substantial unexplained expenses labelled as 'professional' and 'factoring' fees, and indicated that Wells achieved a profit margin of exactly five per cent in 2012, 2013, and 2014. Wells has only had one client: Bariven.

The US criminal proceedings

Mr Rincón is the primary suspect in criminal proceedings in the US involving allegations of multifarious crimes, including obtaining contracts from Bariven through bribery.^[4] In general terms, the US government alleged that Mr Rincón devised a fraudulent and corrupt scheme for obtaining lucrative contracts with PDVSA, including by paying bribes to Bariven employees in exchange for manipulating bidding processes. Mr Rincón allegedly attempted to conceal this scheme by having multiple companies, all linked to Mr Rincón but run by nominal owners or managers, bid for the same contracts.

In 2016, Mr Rincón pleaded guilty to foreign bribery and tax charges. Although the criminal proceedings against the core defendants are still pending, two former Bariven employees have been found guilty of corruption, both of whom had some involvement with contracts obtained by Wells. However, neither Wells nor the contract that was the subject of the arbitration was mentioned in the criminal proceedings.

The contract

In June 2012, Wells applied to Bariven to be an approved vendor. In its application, Wells falsely claimed to have US\$5 million in assets, an office, ten employees, and extensive relevant experience. Wells further misrepresented the identity of its ultimate beneficial owner, and listed a non-existing bank as a reference. Bariven approved the application within seven hours.

In total, Bariven awarded fourteen contracts to Wells through its bidding procedures. In December 2012, Wells won a contract to sell Bariven two top drives, large engines used to power drilling installations on oil platforms (the 'Contract'). The purchase price was approximately US\$11.7 million. Bariven received the engines in June 2014, but refused to pay for them, leading to arbitration between Wells and Bariven.

The bidding procedure through which Wells obtained the Contract had hallmarks of having been rigged. Six of the eleven companies bidding with the procurement entity were associated with Mr Rincón. The composition of the bidding panel was identical to that in two other bidding procedures won by Wells, and three of the Bariven employees involved in the bidding process were found to have received more than US\$3.8 million in bribes from Mr Rincón in relation to different contracts. Although most of these facts were known to the arbitrators, some, like the fact that two former Bariven employees were found guilty of corruption, occurred or were discovered after the award.

The arbitral proceedings

Wells initiated an ICC arbitration in The Hague, claiming payment for the top drives delivered to Bariven in 2014. The arbitral tribunal found the Contract to be governed by Dutch law.^[5]

One of Bariven's defences was that, under Dutch law, the Contract was either void on the ground that it was obtained through corruption and therefore violated public policy, or voidable on the ground that it was obtained through fraud or misrepresentation. The Court of Appeal noted that Wells relied mainly on procedural arguments and failed to adequately respond to the corruption allegations against it.

The arbitral tribunal considered that, because Bariven was the party in the arbitration raising the corruption allegations, it had the burden to prove those allegations. It does not appear from the Court's decision that deciding who bears the burden of proof to make a claim of corruption was an issue of contention. With regard to the standard of proof, the tribunal found that 'the seriousness of the accusation of corruption demands *clear and convincing evidence*. In other words, corruption cannot be shown to exist by arguments based on speculation or by merely alleging indications of the existence of corruption.'^[6]

The tribunal found that Bariven failed to meet its burden of proof. It considered that although the facts relied upon by Bariven undoubtedly raised questions about Wells' conduct, and suggested that Wells might have engaged in bribery to win the Contract, they did not constitute 'clear and convincing' evidence that corruption had occurred. In its award dated 23 March 2018 (the 'Award'), the Hague-seated tribunal ordered Bariven to pay Wells the purchase price for the top drives.

The Hague Court of Appeal's decision

In July 2018, Bariven applied to the Court to set aside the Award on the ground that it violates public policy by condoning corruption.^[7] Wells argued that the award cannot be contrary to public policy, because under Dutch law agreements procured through corruption are merely voidable, not void. An arbitral award granting compensation based on a contract which has not been voided, the argument continues, cannot be contrary to public policy.

The Court disagreed. It considered that giving legal effect to an agreement concluded as a result of corruption frustrates the very foundations of the Dutch legal system, and therefore Dutch public policy.^[8] For the Court, a contract is deemed to be so closely connected to corruption that giving it legal effect violates public policy if: (i) its conclusion was influenced by corruption, and (ii) it would not have been concluded, at least not on the same terms, without corruption. If these two conditions are met, then an arbitral award enforcing that agreement facilitates corruption in violation of public policy and should be set aside.^[9]

The Court also disagreed with the standard of proof applied by the arbitral tribunal. In the Court's terms, a 'clear and convincing evidence' standard is too strict if it requires direct proof that Wells obtained the Contract by paying bribes to Bariven employees. The Court continued that it lies in the nature of corruption that all participants to it have an interest in concealing evidence. The Court found that corruption can be proven by evidence of corruption in the relationships between (employees of) the parties to that agreement in a broader context, especially when the party accused of obtaining the agreement through bribery fails to rebut those accusations.

By applying this standard, the Court found that the Contract would not have been concluded, at least not on the same terms, without corruption. Absent corruption, Wells would not have been approved as a vendor or been able to rig the bidding process. The Court set the Award aside on the grounds that it violated Dutch public policy by giving legal effect to an agreement obtained through corruption.

Analysis

The Court's decision that an award enforcing a contract obtained through corruption is contrary to public policy is the first decision to set out a clear legal framework that can serve as a road map for arbitral tribunals seated in the Netherlands and Dutch set aside courts alike. Nevertheless, the Court's approach raises the following questions from a comparative and international perspective: may an innocent and injured party to a corrupt transaction elect to uphold an agreement procured through corruption? And if it does, how can an award enforcing such an agreement be contrary to public policy?

While nearly all jurisdictions consider corruption to be contrary to public policy, there is no consensus about a transnational public policy against the enforcement of contracts obtained through corruption.^[10] Whereas 'primary contracts' for the exchange of bribes for favours are generally considered to be void *ab initio*, 'secondary contracts' that are reached as a result of those contracts, and where only one of the parties acted corruptly, are generally voidable by the innocent party at its election.^[11]

Taking the Netherlands as an example, none of the international conventions against corruption to which it is a party requires contracts obtained through corruption to be automatically void and unenforceable.^[12] In implementing these conventions, the Netherlands initially adopted a flexible approach under which contracts induced by corruption are not void *ab initio*, but rather are voidable by the injured party.^[13] In a 2017 letter to Parliament outlining how Dutch law complied with the 1999 Civil Law Convention on Corruption,^[14] the Dutch Foreign Affairs Minister highlighted the distinction between the remedies against contracts that provide for corruption, which are *void* pursuant to Article 3:40 of the Dutch Civil Code ('DCC'), and the remedies against contracts that were induced by corruption, which are *voidable* pursuant to Article 3:44 DCC.^[15] Although the validity of the Contract was not directly at issue in this case, the Court's finding that a contract procured through corruption is contrary to public policy could be read as a departure from this flexible approach.^[16]

Wells' argument, rejected by the Court, that an agreement acquired through corruption should be voidable, but not raise public policy concerns, was therefore not completely without merit. The improper practices alleged by Bariven involved two distinct contractual relationships: a primary contract between Wells and Bariven employees to exchange value for favours, and a secondary contract between Wells and Bariven which resulted from those favours (the Contract).

If it is up to the innocent^[17] party to an otherwise legal agreement induced by corruption to either honour or void that agreement, why should it be contrary to public policy to uphold an award enforcing an agreement that the injured party elected to uphold?^[18] English courts have found upholding agreements induced by bribery not to be contrary to public policy. In 2014, the High Court of Justice in England and Wales held that 'where a contract has been induced by bribery it is not contrary to English public policy for the contract to be enforced but it gives the innocent party the opportunity to avoid the contract, at its election, provided counter-restitution can be made.'^[19] The Swiss Federal Supreme Court similarly found that while bribery agreements are contrary to public policy, contracts that might have resulted from corruption are not.^[20]

Conclusion

With this case, the Court has set out a clear legal framework for future set aside courts and arbitral tribunals seated in the Netherlands: Dutch public policy precludes the enforcement of arbitral awards giving legal effect to agreements that both result from corruption and that would not have existed, or at least not on the same terms, without it. Corruption in the inducement of an agreement can be proven by showing corruption in the relationships between the parties to that agreement in a broader context.

The Court may have cast an unduly wide net. From an international and comparative perspective, it is not a forgone conclusion that it is contrary to public policy to enforce agreements that were reached through corruption. In addition, the relatively low evidentiary standard set by the Court could invite frivolous but time-consuming allegations of corruption in cases where corruption cannot be shown from far-advanced criminal investigations, convictions, or guilty pleas.

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- [1] The Hague Court of Appeal 22 October 2019, ECLI:NL:GHDHA:2019:2677 (*Bariven S A v Wells Ultimate Service LLC*).
- [2] The facts described in this article are those described in the judgement. This article does not contain a comprehensive summary of the facts set out in the Court's decision. Instead, it provides a brief overview of the facts necessary to contextualise the Court's finding that awards giving legal effect to agreements procured through corruption can violate public policy.
- [3] The Hague Court of Appeal redacted the names of the individuals involved in the case pursuant to privacy regulations, identifying Mr Rincón only as 'Mr X'. Mr Rincon was later identified in a GAR article. See S Perry, 'Dutch court sets aside PDVSA award because of corruption', *GAR* (7 Nov 2019).
- [4] Except where explicitly stated otherwise, this article only contains facts and allegations on which The Hague Court of Appeal has explicitly based its decision. More information on the US criminal proceedings against Mr Rincón (US District Court for the Southern District of Texas, Docket Number 15-CR-00654), including the indictment filed on 10 December 2015, is publicly available on the website of the US Department of Justice (<https://www.justice.gov/criminal-fraud/fcpa/cases/rincon> (<https://www.justice.gov/criminal-fraud/fcpa/cases/rincon>)).
- [5] The award is not public. The discussion of the arbitral proceedings is based entirely on references to it found in The Hague Court of Appeal's decision.
- [6] The Hague Court of Appeal 22 October 2019, ECLI:NL:GHDHA:2019:2677 (*Bariven S A v Wells Ultimate Service LLC*), at 3.4, citing paragraph 13.3 of the arbitral award (emphasis added).
- [7] Article 1065 of the Dutch Code of Civil Procedure provides, '(1) An award may only be set aside on one or more of the following grounds: [...] (e) the award, or the manner in which it was made, violates public policy.'
- [8] The Hague Court of Appeal 22 October 2019, ECLI:NL:GHDHA:2019:2677 (*Bariven S A v Wells Ultimate Service LLC*), at 5.2 ('De eisen van de rechtstaat verzetten zich ertegen dat rechtsgevolgen worden verbonden aan een overeenkomst die door corruptie tot stand is gekomen. Dat is een fundamenteel beginsel van de Nederlandse rechtsorde dat gelijk moet worden gesteld met dwingend recht van een zo fundamenteel karakter dat de naleving ervan niet door beperkingen van procesrechtelijke aard mag worden verhinderd.').
- [9] This does not necessarily mean that a Dutch court would refuse to enforce a *foreign arbitral award* upholding an agreement meeting those two conditions. Under Dutch law, domestic awards can be set aside when they violate *internal public policy* (Article 1065(1)(e) DCCP) while courts may refuse to enforce foreign awards when they violate *international public policy* (Article 1076(1)(b) DCCP). International public policy is a more narrow concept than internal public policy. Therefore an award that would have violated Dutch internal public policy had it been made in the Netherlands need not necessarily also violate international public policy. See G Meijer, 'Erkenning en tenuitvoerlegging van vreemde arbitrale vonnissen buiten verdrag, commentaar op art. 1076 Rv', *Tekst & Commentaar*, under h.
- [10] J Drude, 'Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration,' *Journal of International Arbitration* (Vol 35-6, 2018), p 683, 86.
- [11]. For the distinction between 'primary' and 'secondary' contracts, see A O Makinwa & X E Kramer, 'Contracts Tainted by Corruption: Does Dutch Civil Law Augment the Criminalization of Corruption,' in: M J Bonell & O Meyer (Eds), *The Effects of Corruption in International Commercial Contracts* (2015), under 3. Although corruption is almost universally against public policy, there is no international public policy against

the enforcement of contracts or investments that were obtained through corruption where these are otherwise legal. See, J Drude, 'Fiat iustitia, ne pereat mundus: A novel approach to Corruption and Investment Arbitration,' *Journal of International Arbitration* (Vol 35-6, 2018), p 686 ('these contracts will be or become valid and binding under the laws of most jurisdictions if the 'innocent' party ratifies the corruptly procured contract and/or waives any termination/invalidation rights in full knowledge of the bribe.').

[12]. A O Makinwa & X E Kramer, 'Contracts Tainted by Corruption: Does Dutch Civil Law Augment the Criminalization of Corruption,' in: M J Bonell & O Meyer (Eds), *The Effects of Corruption in International Commercial Contracts* (2015), under 2; J. Drude, 'Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration,' *Journal of International Arbitration* (Vol 35-6, 2018), p. 683 ("*The international conventions against corruption do not oblige signatory states to adopt legislation to the effect that contracts obtained through corruption must be void and unenforceable.*"). See, e.g., the 2004 United Nations Convention against Corruption, which states in Article 34, "*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action*" (emphasis added). Available at: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf).

[13]. J. Drude, 'Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration,' *Journal of International Arbitration* (Vol 35-6, 2018), p. 683-84, relying on A O Makinwa & X E Kramer, 'Contracts Tainted by Corruption: Does Dutch Civil Law Augment the Criminalization of Corruption,' in: M.J. Bonell & O. Meyer (Eds), *The Effects of Corruption in International Commercial Contracts* (2015), at 214 et seq.

[14]. Article 8 of that Convention ("*Validity of Contracts*") reads: "*(1) Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void. (2) Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.*" Civil Law Convention on Corruption, ETS No. 174 (4 November 1999).

[15]. Letter from the Dutch Minister of Foreign Affairs to Parliament of September 21, 2007, document number: 31230-(R1833) nr. 1/A, available at: <https://zoek.officielebekendmakingen.nl/kst-31230-1.html> (<https://zoek.officielebekendmakingen.nl/kst-31230-1.html>). See, in a similar vein, illustration 16 to Article 3.3.1 of the 2016 UNIDROIT Principles, available at: www.unidroit.org (<http://www.unidroit.org>).

[16]. Article 3:40 DCC provides that agreements that are contrary to public policy are void. It seems a fair assumption that the Court, had it been asked to do so, would have held that Contract is void, because it violates the public policy against giving contracts obtained through corruption legal effect that it identified. However, it goes beyond the scope of this article to consider the effects of Dutch contract law on this case.

[17]. The analysis may differ if knowledge of the corruption can be attributed to both parties to the contract.

[18]. See Z. Douglas, 'The Plea of Illegality in Investment Treaty Arbitration,' *ICSID Review* (Vol 29-1 2014), p. 182-83 ("*If a contract procured by fraudulent misrepresentation is voidable...then it must follow that it is capable of being affirmed by the innocent party...[T]he existence of this possibility demolishes the premise*

that a contract procured by fraudulent misrepresentation cannot be enforced without violating international public policy.")

[19]. English High Court 30 April 2014, [2014] EWHC 1344 (TCC) (*Honeywell International Middle East Ltd v Meydan Group*), at ¶184. Similarly, the English High Court held, in *National Iranian Oil Co. v. Crescent Petroleum Co. Int'l Ltd & Crescent Gas Corp. Ltd.*, that "[t]here is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other." English High Court 4 March 2016, [2016] EWHC 510 (Comm), at ¶49.

[20]. Swiss Federal Supreme Court, BGE 119 II 380 S. 385, at 4(c) ("*En l'espèce, il ne faut pas perdre de vue non plus que les prétentions exercées ne se fondent pas sur un contrat de pot-de-vin mais sur des contrats pour la conclusion desquels des pots-de-vin auraient été versés. Selon la conception qui prévaut en droit suisse [...] leur contenu n'est, en effet, pas vicié.*").

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