



Dutch court sets aside PDVSA award because of corruption

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The Court of Appeal in The Hague has set aside an ICC award against a subsidiary of Venezuela's state-owned oil and gas company PDVSA on the ground that the underlying contract was procured through corruption.

On 22 October, the court [upheld an application](#) by PDVSA subsidiary Bariven to partially annul the award on public policy grounds, finding that the arbitrators applied too stringent a standard in dismissing allegations that Wells had obtained the contract through corrupt means.

Dentons Boekel represented Bariven in the Dutch courts with assistance from Squire Patton Boggs, which acted for the PDVSA entity in the arbitration alongside Loyens & Loeff.

The contractor, Texas-registered company Wells Ultimate Service, relied on Houthoff in the ICC case and the set-aside proceedings.

An ICC tribunal seated in The Hague issued the award in March 2018, ordering Bariven to pay US\$11.7 million plus interest and costs to Wells for failing to honour a 2012 contract for the purchase of two "top drives" – large motors used on drilling platforms.

The tribunal was chaired by **Dominique Aarts**, a Belgian arbitrator based in Liège, and included two Dutch co-panellists: **Willem van Baren**, a former president of the Netherlands Arbitration Institute; and **Rieme-Jan Tjittes** of BarentsKrans in The Hague, who has previously served as a justice at the Amsterdam Court of Appeal.

In the arbitration, Bariven asserted that the Dutch-law contract was void through corruption and that Wells was a shell company set up as part of a bribery scheme led by convicted Venezuelan businessman Roberto Enrique Rincón Fernández – who is the father of Wells' president and the brother-in-law of its ultimate beneficial owner.

Rincón, who resides in Texas, [pleaded guilty](#) to foreign bribery and tax charges before a Houston federal court in 2016. He admitted to paying bribes to ensure that his

companies were placed on PDVSA bidding panels to enable them to win contracts. Five former Bariven employees were also indicted in the US, including individuals involved in the approval of contracts with Wells. (The names of Rincón and the other individuals indicted in the US are redacted in the Dutch court's published judgment.)

While Wells was not named in the US indictments, it had the same address as three Rincón-affiliated companies and the same registered agent as 25 other such companies. Bariven was Wells' only client and source of revenue, and Wells' accounts showed it had entered into "related-party transactions" with several companies implicated in the US criminal proceedings.

"Not sufficiently concrete"

In its award, the ICC tribunal observed that it was up to Bariven to prove the alleged facts on which its defence was based. While noting it was difficult to prove corruption, the tribunal said the seriousness of the accusation demands "clear and convincing evidence". Corruption could not be shown to exist by arguments "based on speculation" or by merely alleging "indications" of the existence of corruption.

The tribunal found that, while the circumstances on which Bariven relied in its defence "undoubtedly raise questions as to the (legitimate) nature of Wells' conduct," the allegations were "not sufficiently concrete" to make out corruption to the required standard.

None of the documents from the US criminal proceedings mentioned Wells as one of the corrupt companies and Bariven had not pointed to any direct evidence that Wells had obtained the contract in question through payment of bribes, the tribunal said.

Bariven submitted evidence it said showed that Wells was part of Rincón's bribery scheme and had employed the same corrupt methods in securing Bariven contracts. It observed that several former Bariven employees convicted of accepting bribes from Rincón were involved in the procurement process that led to the contract with Wells.

The PDVSA entity also noted that all five bids for the contract had come from Rincón-affiliated companies and contained striking similarities. However, the tribunal said this evidence – which Wells had produced after the final hearing – had been submitted too late and that it would violate due process to consider it except in relation to Bariven's arguments that the top drives had been overpriced.

The tribunal observed in passing that, even if corruption had been proven, the result would be the same. If the contract was held to be void from the outset, Dutch law would have required Bariven to return the top drives to Wells or pay compensation for them.

Bariven's US\$8 million counterclaim for overpricing was also rejected, with the tribunal finding it had no jurisdiction insofar as the claim related to deliveries under other contracts with Wells.

Wells applied to the Portuguese courts to enforce the award, but the enforcement proceedings were suspended while the Dutch courts considered Bariven's application to set it aside.

Bariven also urged the Dutch court to take account of further developments in the US criminal proceedings, including court testimony by a US special agent about the corrupt conduct of Bariven employees favouring Rincón; the guilty plea of a former Bariven official; and the arrest of two other former Bariven officials in Spain pending extradition to the US.

“Strong indications” of corruption

In the latest ruling, the court said it was a fundamental principle of the Dutch legal order that agreements created through corruption should not be given legal effect. It said the decisive question was whether the agreement would have been concluded, or concluded under the same conditions, if the corruption had not taken place.

The court said it was empowered to independently assess whether the contract was concluded under the influence of corruption on the basis of facts determined by the tribunal as well as facts that occurred after the award was rendered. The court was also not bound by the tribunal’s decision to exclude evidence on procedural grounds.

In the court’s view, the evidence that had been before the arbitral tribunal provided “strong indications” that the contract was procured corruptly.

This included the fact that three Bariven employees convicted of taking bribes from Rincón’s companies were involved in the process leading to Wells’ contract; and that Rincón had ties with Wells’ owners and management, which made it safe to assume that he benefited from orders placed with Wells. It was also notable that Wells had existed for less than a month when it applied to become a Bariven vendor and was approved within seven hours of its application.

The court observed that Wells was not a “normal company”: despite its representations to Bariven when it registered as a vendor, it did not have an office or employees or clients other than Bariven, and its annual figures reported expenses and profit margins that could not be explained.

It also noted that in the arbitration Wells had submitted a redacted invoice for the purchase of the top drives from its supplier, which was 5% less than the price of the contract with Bariven. The court said this price difference was “striking”, as it suggested the price payable to the supplier was established by deducting 5% from the sale price to Bariven, whereas a broker would normally be expected to put a percentage on top of the price paid to the supplier. The 5% figure was also identical to the annual profit margin reported by Wells in its accounts.

The court said the circumstances were consistent with the “pattern of corruption that has emerged in general terms” in the US criminal proceedings – namely that of Rincón and his associates paying bribes to ensure that his companies were included on vendor bidding panels so that bids could be coordinated.

The fact that Wells was not specifically mentioned in the documents from the US criminal proceedings said nothing about its involvement in corruption, the Dutch court said, since not all the documents from those proceedings were available and those in the public domain generally refer to Rincón’s companies without naming them individually.

It was certain that Rincón had ties with Wells, making it “unlikely” that Wells did not obtain the contract through corruption, the court said. It noted that Wells had failed to provide a substantive explanation for the indications of corruption and had instead put forward a defence mainly based on procedural grounds.

The court said the tribunal had applied too strict a standard in requiring direct proof that Wells had obtained the contract through payment of bribes. It noted that individuals or businesses that are guilty of corruption will generally do everything to conceal that corruption as effectively as possible and that, as a result, direct evidence of bribery leading to the award of a contract will generally be very difficult to produce.

According to the court, the conclusion of an agreement under the influence of corruption could be assumed in the broader context of the relations between employees of the parties to that agreement.

It also dismissed Wells’ argument that knowledge of the corruption on the part of former members of Bariven’s management must be imputed to Bariven. The court said the bribery scheme was not in Bariven’s interest and that the former officials involved had an interest in hiding corruption from Bariven.

The court said it did not need to determine whether there had been actual overpricing in order to rule on the corruption issue, though it found it was plausible that the top drives had been overpriced. The fact that the motors had been supplied and put into use by PDVSA was irrelevant, and the consequences of the invalidity of the contract were not within the court's discretion, it said.

The court declined Wells’ request to suspend the annulment proceedings and remit the matter to the arbitral tribunal, saying this would serve no purpose. However, it agreed to uphold the tribunal’s negative jurisdictional findings with respect to Bariven’s counterclaim.

Restitution claim and another ICC case

Bariven [intervened](#) in the US proceedings against Rincón and other defendants in 2016, asserting it should be granted “victim” status under two US federal statutes and receive restitution of US\$600 million. The US Department of Justice [contested the motion](#), alleging that Bariven was complicit in the wrongdoing and that as a “state-owned instrumentality of a foreign government” it cannot qualify as a victim under US law. The court denied Bariven’s motion as premature in 2017.

The PDVSA subsidiary’s [filings in the US court](#) also allude to another ICC arbitration launched against it by four Rincón-affiliated companies implicated in the criminal proceedings: Tradequip Services and Marine, Reliable Process and Instruments, Ovarb Industrial and Premiere Procurement Group.

Bariven said those companies were seeking payment for contracts that Rincón had already admitted were obtained through bribery. The PDVSA entity complained that the claimants’ pleadings in that arbitration amounted to an attempt to retract Rincón’s guilty plea in the US criminal proceedings.

Tradequip and the other claimants are understood to be seeking US\$108 million in that case, which is also seated in The Hague. Bariven and co-respondent PDVSA have brought a US\$340 million counterclaim, which relates to contracts at issue in the claimants' claim as well as further contracts allegedly procured through corruption.

The tribunal hearing the case consists of Belgian arbitrator **Vera van Houtte** as chair, **Mark Kantor** of the US appointed by the claimants and France's **Jacques Salès** appointed by Bariven and PDVSA.

The Rincón companies are represented by King & Spalding and Clark Hill, the latter firm also acting as Rincón's criminal defence counsel. Bariven and PDVSA have again been using Squire Patton Boggs and Dentons Boekel (the latter having taken over from Loyens & Loeff last year).

GAR understands the ICC case has been suspended since March while the parties seek authorisation from the US Treasury Department's Office of Foreign Assets Control (OFAC) to continue with the arbitration. This followed OFAC's [announcement of sanctions](#) against PDVSA in January, which generally prohibit US persons from engaging in transactions with the state entity.

There is also a third ICC arbitration against Bariven underway, brought by an entity that is not owned by Rincón but is alleged by Bariven to have benefited from his scheme. Further details are not yet unavailable.

Wells Ultimate Service LLC v Bariven

Before the Court of Appeal of The Hague

Counsel to Bariven

- Dentons Boekel

Partners **Michel Deckers** and **Anouk Rosielle** and associate **Jordi Van Borssum Waalkes** in Amsterdam

- Squire Patton Boggs (assisted on the briefs until February 2019)

Counsel to Wells

- Houthoff

Partners **Dirk Knottenbelt** and **Thomas Stouten** and foreign associate **Matthew Brown** in Rotterdam

In the Portuguese enforcement proceedings

Counsel to Wells

Unconfirmed

Counsel to Bariven

- Gómez-Acebo & Pombo

Partner **Miguel de Avillez Pereira** and lawyer **Ana Grosso Alves** in Lisbon

Wells Ultimate Service v Bariven (ICC Case No. 21754 / FS)

Tribunal

- **Dominique Aarts** (Belgium) (chair)
- **Rieme-Jan Tjittes** (Netherlands) (appointed by Wells)
- **Willem van Baren** (Netherlands) (appointed by Bariven)

Counsel to Wells

- Houthoff

Partners **Dirk Knottenbelt** and **Thomas Stouten** and foreign associate **Matthew Brown** in Rotterdam

Counsel to Bariven

- Squire Patton Boggs (from August 2016, after tribunal was constituted)

Partners **Raúl Mañón** and **Rebekah Poston** in Miami and **Stephan Adell** in Paris; and associates **Eugenia Brache** and **Francisco Batlle** in Santo Domingo

- Loyens & Loeff

Partner **Tom Claassens** and associates **Jonathan Ruff**, **Melle Boevink** and **Eva Slabbers** in Rotterdam

Tradequip Services and Marine, Reliable Process and Instruments, Ovarb Industrial and Premiere Procurement Group v Bariven and PDVSA (ICC Case No. 22178/FS)

Tribunal

- **Vera Van Houtte** (Belgium) (chair)
- **Mark Kantor** (US) (appointed by claimants)
- **Jacques Salès** (France) (appointed by Bariven and PDVSA)

Counsel to the claimants

- King & Spalding

Partner **Doak Bishop** and senior associate **Eldy Roché** in Houston and senior associate **Aloysius Llamzon** in Washington, DC, and New York

- Clark Hill (following its merger with Strasburger & Price)

Partners **Gary Siller** and **Garney Griggs** in Houston

- Houthoff

Partner **Dirk Knottenbelt** in Rotterdam

Counsel to Bariven and PDVSA

- Squire Patton Boggs

Partners **Raúl Mañón** in Miami, **Stephen Anway** in New York and **Stephan Adell** and **José Ricardo Feris** in Paris; and associates **Mark Stadnyk** in New York and **Eugenia Brache** and **Francisco Batlle** in Santo Domingo

- Dentons Boekel (from September 2018)

Partners **Michel Deckers** and **Anouk Rosielle** and associate **Jordi Van Borssum Waalkes** in Amsterdam

- Loyens & Loeff (until August 2018)

Partner **Tom Claassens** in Rotterdam and associates **Jonathan Ruff**, **Melle Boevink** and **Eva Slabbers** in Rotterdam