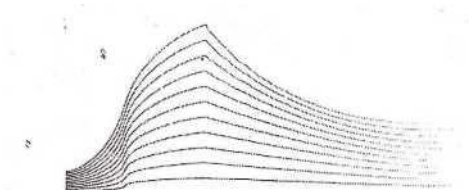

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N° 286

French-speaking Court of First Instance, Brussels, Civil Section

Judgement

4th Chamber

civil cases

presented on

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Final judgement after full argument submission

1Quotation
1 Request
1 Order
7 Conclusions

IN THE MATTER OF:

The **REPUBLIC OF KAZAKHSTAN,** represented by the Minister of Justice, the Ministry of Justice, 010000 Astana (Kazakhstan), Left Bank, Mangilik El Street 8, House of Ministries, 13;

Applicant,

Represented by **Maitre NUYTS Arnaud and Maitre HARDY Bruno**, lawyers, whose firm'Ss registered office is located at 1000 Brussels, Boulevard de l'Empereur, 3;
Email: a.nuyts@liedekerke.com; b.hardy@liedekerke.com;

AGAINST:

1. Mr [Mrs]. **Anatolie STATI,** domiciled in Moldova, at MD-2008, 20 Dragomirna Street,Chisinau;
2. Mr **Gabriel STATI,** domiciled in Moldova at MD-2008, IA Ghioceilor Street, Chisinau;
3. The company under foreign law **ASCOM GROUP S.A.** (Ascom), whose registered office is in Moldova, MD-2009, 75 A., Mateevici Street in Chisinau;
4. The company under foreign law **TERRA RAF TRANS TRAIDING LTD**. (Terra Raf), whose registered office is located at Gibraltar G1-13/1 Line Wall Road;

having made election of residence at the office of their judicial officer, Maître Sacré Marc, located at 1081 Koekelberg, Avenue de Jette, 32, in their service document of 2 January 2018 of the Order of exequatur commercial;

Defendants :

Represented by **Maitre JACMAIN Sophie, Maitre VAN DROOGHENBROECK Jean-François and Maitre BRUS Stan,** lawyers, whose firm is established at 1000 Brussels, Chaussée de la Hulpe, 120;
Email: sophie.jacmain@nautadutilh.com; jean-francois.vandrooghenbroeck@nautadutilh.com; stan.brijs@nautadutilh.com;
In this case, under deliberation on 15 November 2019, the Court rendered the following judgement:
Having regard to the pleadings in the proceedings and in particular:

- the summons in third party opposition against an exequatur order served on 2 February 2018;

- the order under Article 747(1) of the Judicial Code delivered on 11 July 2018;
- the application based on a document or new fact filed in the Registry on 9 April 2019;
- the order under Article 748 of the Judicial Code. issued on 2 May 2019;
- the principal and summary submissions and the third additional and summary submissions after adjournment of the case for the Applicant filed at the Registry on 30 November 2018, 29 March 2019 and 12 August 2019;
- the first submissions, the second submissions, the summary submissions and the summary submissions after adjournment for the defendants filed at the Registry on 28 September 2018, 31 January 2019, 17 April 2019 and 28 October 2019;
- the parties' files of exhibits;

Having heard counsel for the parties in their submissions and arguments at the public hearings of 9-10 May 2019 and 13-15 November 2019;

I. STATEMENT OF FACTS

On 17 December 1994, Kazakhstan signed and ratified the Energy Charter Treaty (hereinafter referred to as the "ECT").

Between 1999 and 2003, Anatolie Stati and her son, Gabriel Stati, invested, *through the* Ascom Group S.A. ("Ascom") and Terra Raf Trans Traiding ("Terra Raf") companies, in two entities under Kazakh law, Kazpolmunay LLP ("KPM") and Tolkynneftegaz LLP ("TNG") in order to exploit hydrocarbon deposits located in Kazakhstan. In 2005, the Stati acquired all the shares of KPM and TNG.

Prior to being purchased by the Stati, KPM and TNG had been authorised by Kazakhstan to explore and develop various oil and gas fields in the country under various land use agreements.

In 2006, TNG began construction of a liquefied petroleum gas power plant (the "LPG Plant").

In 2007, a first dispute arose between the Stati and Kazakhstan concerning the existence of a pre-emptive right of the company TNG for the benefit of Kazakhstan.

In the summer of 2008, the Stati decided to put the companies KMP and TNG as well as the LPG Power Plant up for sale. The operation was called "Project Zenith".

In August 2008, the Stati therefore drew up an Information Memorandum to justify the value of the assets put up for sale to potential buyers. This Memorandum was based in particular on the financial statements of KPM and TNG, including the investment costs of the LPG Plant.

On 29 August 2008, the auditing firm KPMG issued a due diligence report on the proposed sale of the Stati.

Also in August 2008, Meridian Petroleum and Total made a non-binding indicative offer to purchase TNG, the company in charge of the LPG plant.

On 27 September 2008, KazMunaiGas (hereinafter referred to as 'KMG'), a company wholly owned by Kazakhstan, also submitted an indicative offer.

This indicative offer stated, inter alia, that *"in formulating our indicative offer, we have relied on the information contained in the Information Memorandum and certain publicly available information*. *Our assessment is subject to confirmation of the reality of this information and assumptions in the second phase through the review of documents and meetings to be held"* (Exhibit 8.13, p.3, Kazakhstan case file, uncontested free translation). This indicative offer also indicated that, in the absence of complete information, the evaluation was the result of the weighted average of the results obtained by comparative and cost methods.

In October 2008, Kazakhstan initiated a financial investigation to verify whether KPM and TNG were in compliance with the export tax laws and had the required licences to operate.

In November 2008, Kazakhstan carried out a full tax audit of KPM and TNG for the years prior to 31 December 2007.

In 2009, Kazakhstan sought to regain possession of TNG's assets and rights, notably by cancelling the authorisation for Terra Raf to repurchase TNG.

In a letter dated 18 March 2009, the Stati made two proposals to Kazakhstan to resolve the dispute between the parties. The letter also stated that in the event of refusal

on the part of Kazakhstan, the Stati would bring the dispute before the Stockholm Chamber of Commerce ("SCC") pursuant to the ECT (Exhibit 1.15, Stati file).

A letter sent by the Stati on 7 May 2009 reiterated their intention to bring the dispute before the SCC (Exhibit 1.16, Stati file).

On 16 June 2009, the Stati took out a loan from a group of venture capital investors. This transaction was called the "Laren transaction".

On 26 January 2010, Kazakhstan launched bankruptcy proceedings against the company KPM.

On 21 July 2010, Kazakhstan terminated the land use contracts held by KPM and TNG. KMG has taken over the operation of the oil fields.

On July 26, 2010, the Stati filed a request for arbitration with the SCC pursuant to Article 26 of the ECT. In their request for arbitration, they requested, inter alia, that the tribunal be composed of three arbitrators and that the SCC, in accordance with Article 13 (3) of its Rules, appoint an arbitrator if Kazakhstan did not appoint any.

By letter dated 5 August 2010, the SCC forwarded the Stati's request to Kazakhstan. Referring expressly to Article 5 of the SCC Institute of Arbitration's Rules of Arbitration, the letter also invited Kazakhstan to send its reply by 26 August 2010 at the latest. The letter further specified that the expected reply should contain comments on the seat of the arbitration and the Stati's proposal to have the chairman of the arbitral tribunal appointed by the appointed arbitrators (Exhibit 1.17, Stati file).

This letter was received by Kazakhstan on 11 August 2010 (Exhibit 1.3, Kazakhstan file).

On 27 August 2010, the SCC sent a reminder letter to Kazakhstan requesting a reply by 10 September 2010 and stating that a failure to reply would not impede the arbitral proceedings. This letter was received by Kazakhstan on 31 August 2010 (Exhibit 1.19, Stati file).

On 13 September 2010, the Stati filed a request for the appointment of an arbitrator by default for Kazakhstan, pursuant to Article 13 (3) of the SCC Arbitration Rules.

This request was notified by the SCC to Kazakhstan on 23 September 2010.

On 15 September 2010, the SCC informed the parties to the arbitration of its decision to appoint Professor Lebedev as arbitrator for Kazakhstan by default.

By letter of 2 December 2010 from its counsel, Kazakhstan challenged Professor Lebedev's appointment, arguing that the time limit for a reply was unreasonable and that the appointment had been made in unjustified haste.

The Stati challenged Kazakhstan's objection by letter of 6 December 2010.

By decision of 15 December 2010, the SCC rejected Kazakhstan's objections and confirmed Professor Lebedev's appointment (Exhibit 1.12, Kazakhstan file).

On 19 December 2013, the Arbitral Tribunal made an award in which it ordered Kazakhstan to pay the Stati the sum of USD 497,685,101 plus costs and interest.

On the merits, the arbitral tribunal described the Kazakh authorities' conduct from October 2018 onwards as *"harassment measures (...) considered as a violation of the obligation to treat investors in a fair and equitable manner, in accordance with Art. 10(1) of the ECT"* (§1095). It went on to hold that *"the conduct of* (Kazakhstan) *clearly had a considerable influence on the value of the investment and, therefore, on the quantum of damages and interest"* (§1502).

The arbitral tribunal then ruled on the damage suffered by the Stati as a result of what it described as *"concerted and aggressive state actions, including inspections, criminal charges and seizure of assets"* by Kazakhstan. The parties filed with the arbitral tribunal various evidence to support their assessment of the damage. To this end, the Stati notably submitted the indicative offer made in September 2008 by KMG.

With regard to the assessment of the damage suffered by the Stati, the parties argued before the arbitral tribunal on the following points:

- the recognition of certain debts for the assessment of the enterprise value of KPM and TNG;
- the reduction of development actions at the Borankol and Tolkyn fields;
- the loss of a chance to discover a new exploitable part of the Inter-oil reef if Contract 302 were to be extended until March 2011;
- the value of the LPG Plant;
- the existence of moral damage;
- the existence of tax claims in favour of Kazakhstan to be offset against the damages and interest awarded;
- the impact of the aborted transaction with the Cliffson company.

As regards the inclusion of debts, the arbitral tribunal held that *"only debts governed by the Reachcom loan Agreement, the Limozen loan Agreement and the Reachcom debt purchase Agreement are to be deducted from the damages and interest to be awarded"* (§1542). It stated that *"the Laren debt was caused by the conduct of the Defendant*

which this Tribunal now considers to be a violation of the ECT. Moreover, it was reimbursed, as Mr. Lungu testified (...). The Tribunal sees no reason why it (the Laren debt) *should be deducted from the damages and interest awarded*" (§1540). The arbitral tribunal also held that Tristan's obligations should not be deducted from the damages and interest awarded either (§1771).

The tribunal adopted an amount of USD 277.8 million as damages and interest for the loss in value of the assets due to the reduction of the above-mentioned development actions (§§1632 to 1625).

With regard to the loss of future profits due to the continued exploration of the Inter-oil reef, the arbitral tribunal considered that the Stati did not prove their damage nor its causal link (§1691).

As to the quantum relating to the LPG plant, the arbitral tribunal found that:

"1746. With regard to the amount of damage caused by the action of the Respondent, the Tribunal took note of the various comprehensive arguments submitted by the Parties based on the reports of their respective experts. However, the Tribunal does not consider it necessary for it to evaluate these reports and the very different results they have reached. In the Tribunal's view, the contemporaneous offers that were made for the LPG factory by third parties after the Applicants' efforts to sell the LPG factory, both before and after 14 October 2008, represent the best source of relative valuation for the valuation date accepted by the Tribunal. Prospective purchasers made an offer for the plant, not as salvage value, but for possible operation. This is reflected in the uncontested indicative bids submitted by interested buyers in 2008, which estimated the LPG factory at USD 150 million on average. In this context, the Tribunal is not persuaded by the Respondent's argument that these offers did not reflect the expected price that the bidders were willing to pay, but that they were only strategic offers to gain access to the data room. In this context, the Tribunal attaches limited probative value to the testimony of the Respondent's witnesses for KNOC and Total E&P, given that these foreign companies remain active investors in Kazakhstan and therefore, for understandable reasons, wish to maintain good relations with the Government of that country.

1747. On the other hand, the Tribunal considers it particularly relevant that an offer of USD 199 million was made at that time by KMG, a State-owned company, for the LPG factory. The Tribunal considers this value to be the best relative source of information, among the various sources of information provided by the Parties, for the valuation of the LPG factory during the relevant period of the valuation date accepted by the Tribunal.

1748. Therefore, this is the amount of damages that the Tribunal accepts in this context" (arbitral award of 19 December 2013, uncontested free translation of the Stati).

The arbitral tribunal therefore awarded the Stati compensation fixed at USD 508,130,000, i.e.:

- 277,800,000 USD: quantum related to the Borankol and Tolkyn fields (value of combined assets)
- 31,330,000 USD: quantum related to the Contract 302 properties (capital expenditures incurred by the Stati)
- 199.000,000 USD: quantum related to the LPG plant.

The arbitral tribunal deducted from this amount certain liabilities up to USD 10,444,899.

On 17 January 2014, the arbitral tribunal issued a corrective award under Article 41 of the SCC Arbitration Rules and Article 32 of the Swedish Arbitration Act. That corrective award is mainly concerned with the costs of the arbitration proceedings.

Kazakhstan brought an application to set aside these awards before the Svea Court of Appeal (Sweden).

In a judgement delivered on 9 December 2016, the Svea Court of Appeal dismissed the application to set aside the arbitral awards of 19 December 2013 and 17 January 2014.

For their part, the Stati have filed applications for the enforcement of the above-mentioned awards in several countries. They thus obtained exequatur:

- in Great Britain by a decision of 28 February 2014 of the High Court in London;
- in Luxembourg on 30 August 2017;
- in Belgium by order of the French-speaking Court of First Instance of Brussels of 11 December 2017;
- in the United States by a decision of the Court of the District of Columbia on 23 March 2018;
- in Italy by a decision of the Court of Appeal of Rome on 29 January 2018.

They also filed an application for exequatur in the Netherlands on 26 September 2017, the fate of which is not yet decided.

Kazakhstan has lodged objections or appeals against each of the foreign decisions granting exequatur of the disputed awards. However, none of Kazakhstan's appeals to date have been successful, either because they have been dismissed or because they are still pending. The opposition proceedings in the United Kingdom ended with the withdrawal of the Stati's application for exequatur.

By summons served on 2 February 2018, Kazakhstan lodged an objection to the order of 11 December 2017 before the domestic court. This is the present case.

IT IS THE SUBJECT OF THE APPLICATION

Kazakhstan requests the court to set aside the exequatur order issued on 11 December 2017.

The Stati submit that the application should be rejected.

Each of the parties seeks an order that the other party should pay the costs, including procedural damages assessed at €36,000 on each side, that is to say, the maximum provided for in a case which cannot be assessed in monetary value.

III. DISCUSSION

In support of its application to set aside the exequatur order, Kazakhstan relies on three arguments:

1. the lack of jurisdiction of the Court of First Instance;
2. the obtaining by the Stati of the arbitral award by fraud;
3. the irregularity of the arbitral proceedings, in particular the lack of jurisdiction of the arbitral tribunal and the violation of Kazakhstan's rights of defence.

1. As to the first argument alleging lack of jurisdiction of the Court of First Instance

Kazakhstan considers that the Court of First Instance was not competent to rule on the application for enforcement of an arbitral award to which the Law of 24 June 2013 amending Part VI of the Judicial Code on Arbitration was not applicable.

Kazakhstan therefore maintains that the application for exequatur should have been brought before the President of the Court of First Instance, and not before the Court of First Instance, pursuant to the former Article 1719 §1 of the Judicial Code.

Article 3 of the Judicial Code provides that:

> *"The laws of judicial organisation, competence and procedure are applicable to the trials in progress without, however, relinquishing the jurisdiction of which, at its level, it had been validly seized and subject to the exceptions provided for by law.*

This article therefore expressly provides for the possibility for the legislature to derogate from the principle of immediate applicability of procedural laws. In order to do so, the latter will have recourse to one or more so-called transitional provisions. It is also understood that such a derogation will be strictly interpreted.

The above-mentioned Act of 24 June 2013 is a procedural law that entered into force on 1st September 2013 and applies, in principle, to ongoing trials in accordance with Article 3 of the Judicial Code.

However, the 2013 legislature has provided for a derogation regime defined in Article 59 of the Law of 24 June 2013 in the following terms:

"This Act applies to arbitrations that commence in accordance with section 34 after the date on which this Act comes into force.

Part VI of the Judicial Code, as it was drafted before the entry into force of this Act, shall continue to apply to arbitrations that commenced before the date of entry into force of this Act.

This Act shall apply to actions that are brought before the court, insofar as they concern an arbitration referred to in paragraph 1.

Part VI of the Judicial Code, as it was drafted before the coming into force of this Act, shall continue to apply to actions pending or brought before the judge in respect of an arbitration referred to in paragraph 2".

Article 34, to which Article 59 refers, inserts a new Article 1702 into the Judicial Code worded as follows:

"Unless otherwise agreed by the parties, the arbitral proceedings shall commence on the date on which the Request for Arbitration is received by the Respondent in accordance with Article 1678, §1, a)".

Lastly, the above-mentioned article 1678 of the Judicial Code states that:

"§1 Unless otherwise agreed by the parties, the communication shall be delivered or sent to the addressee in person, or to his domicile, or to his residence, or to his e-mail address or, in the case of a legal person, to its registered office, or to its principal place of business or to its e-mail address.

§2 Unless otherwise agreed by the parties, time limits which begin to run in respect of the addressee, from the time of the communication, shall be calculated:

a) where the communication is made by delivery with a dated acknowledgement of receipt, from the first day following;

b) where the communication is made by electronic mail or by another means of communication which provides proof of sending, from the first day following the date indicated on the acknowledgement of receipt (...)".

In the present case, the SCC communicated the Request for Arbitration to Kazakhstan by letter of 5 August 2010, received on 11 August 2010.

Kazakhstan therefore submits that, pursuant to the above-mentioned provisions, Part VI of the Judicial Code, as it was drafted before the entry into force of the Law of 24 June 2013, is applicable to the entire disputed arbitral proceedings, including the judicial phase.

On the other hand, the Stati take the view that Article 59 of the Law of 24 June 2013 applies only to Belgian arbitrations and not to international arbitrations, which are subject to the principle of immediate applicability of a procedural law provided for in Article 3 of the Judicial Code. They submit that the order of 11 December 2017 was rightly made on the basis of the new Part VI of the Judicial Code as amended by the law of 24 June 2013.

Article 1676, in the version in force since 1st September 2013, provides in particular that:

> *"§7. Part VI of this Code shall apply and Belgian judges shall have jurisdiction when the place of arbitration within the meaning of Article 1701, §1, is located in Belgium, or when the parties have so agreed.*
>
> *§8. Notwithstanding §7, the provisions of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 shall apply irrespective of the place of arbitration and notwithstanding any contractual clause to the contrary".*

Article 1676, §§7 and 8 mentioned above therefore provides that, with the exception of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722, Belgian judicial law on arbitration applies only to Belgian awards, to the exclusion of foreign awards.

By including a derogatory list of specific articles, without any reservation or possibility of supplementing that list, Article 1676 §8 cannot be interpreted as implying the possibility of applying other provisions of Part VI of the Judicial Code to foreign arbitral proceedings. The exhaustive and restrictive nature of the list of articles set out in Article 1676 §8 is in unequivocal terms.

To maintain, as Kazakhstan does, that this derogatory list is merely illustrative is contrary to the elementary principles of legislative drafting, including that of legal certainty.

Moreover, such an interpretation would be contrary to the clear text of Article 1676 §8, which authorises the application to foreign arbitral proceedings of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 alone.

Neither Article 1678, which sets out the mode of communication between the parties in arbitration proceedings, nor Article 1702, which sets out the commencement of arbitral proceedings, are among the provisions referred to in Article 1676 §2 applicable to foreign arbitral proceedings.

These two articles are therefore intended to apply only to Belgian arbitral proceedings in accordance with Article 1676, §7 of the Judicial Code.

In general, it is not for the Belgian legislature to define the arbitration procedure applicable to a foreign arbitration. In this sense, the derogatory list contained in Article 1676 §8 refers only to provisions which do not affect the substantive rules of the arbitral procedure, provisions such as, for example, the procedure for exequatur of an award before declaring it enforceable or final.

It would be equally inappropriate to take into account the date of commencement of foreign arbitral proceedings which are not governed by Belgian law in order to determine which version of Belgian law is applicable in case of enforcement of the award[1].

Consequently, by referring to the aforementioned Article 1678, §1, Article 1702 can only define the starting point of Belgian arbitral proceedings, to the exclusion of foreign arbitral proceedings.

The fact that, for the sake of consistency, the Belgian legislature has adopted the same communication process as that set out in the UNCITRAL Model Law does not make it possible to hold that it intended to extend the scope of application of article 1702 beyond Belgian procedures.

The parties also both refer to the *ratio legis* of Article 59, which is set out as follows in the parliamentary records:

"For reasons of legal certainty, it is not desirable for the same arbitral proceedings to be subject to two separate sets of rules with regard to the procedural law of arbitration. It is therefore necessary to avoid distortions with the arbitration rules of arbitral institutions based on current arbitration procedural law because these rules of procedure of the arbitration rules are frequently applied to ongoing arbitrations"[2].

However, since foreign arbitral proceedings are never subject to Belgian law, except in the context of the enforcement of the award, there is no risk that the same arbitral proceedings are subject to two separate sets of rules of Belgian law. Therefore, the risk raised during the preparatory discussions is necessarily only aimed at

[1] N. BASSIRI and M. DRAYE, *Arbitration in Belgium*, 2016, Leuven, Wolters Kluwer, p.545.
[2] *Parl.Doc*., House, Session 2012-2013, 53-2743/1, pp. 44-45.

proceedings commenced before a Belgian arbitral tribunal before September 2013 and whose enforcement is prosecuted before the Belgian exequatur court after September 2013.

As noted by the Stati, the Amsterdam Court used the same reasoning in the application for exequatur lodged in September 2017 in the Netherlands.

Indeed, on 2 June 2014, a new Dutch law was adopted amending, in particular, the Dutch Code of Civil Procedure with regard to arbitration. The Dutch Code of Civil Procedure also lays down the principle of the immediate applicability of procedural laws.

Article 4 of the Law of 2 June 2014 nevertheless provides for a specific transitional regime comparable to the Belgian transitional regime.

In its judgement of 6 November 2018, the Amsterdam Court of Appeal deduced from the text of article 4 of the Dutch law and its preparatory discussions that the transitional regime provided for in the Law of 2 June 2014 did not apply to international arbitrations already in progress at the time of the entry into force of the said Law. Indeed, the Court held that *"these arbitration proceedings* (international arbitrations) *were not subject to the old arbitration law, so that that law cannot 'remain' applicable on the basis of non-retroactive effect and therefore the problem of the applicability of two different types of arbitral procedural law to the same legal proceedings does not arise"* (Exhibit 7.2, Stati case file, uncontested free translation, their submissions, p. 60).

Consequently, both the clarity of the texts and the *ratio legis* of the special transitional regime make it possible to identify the Judicial Code as amended by the Law of 24 June 2013 as the version applicable in the present case.

It is therefore with good reason that the order of 11 December 2017 was adopted by the French-speaking Court of First Instance of Brussels acting pursuant to the new Articles 1680 §6, 1719 to 1721 of the Judicial Code.

The first ground for setting aside this order is dismissed.

For the rest, the Court notes that the entry into force of the law of 25 December 2016 on various provisions in the field of justice (known as the "Pot Pourri IV law") does not affect the foregoing[3]considerations.

[3] Indeed, the preparatory discussions of the Act unequivocally state that *"the present draft concerns amendments to the new Part VI, inserted in 2013. Therefore, there is no need for a specific transitional provision. Arbitration proceedings pending under former Part VI, and proceedings relating thereto before the State courts under the same former Part VI, shall remain governed by the same. With regard to arbitration proceedings in progress under the new Part VI, and related proceedings before state courts under the new Part VI, the requirement of Article 3 of the Judicial Code shall apply" (Parl. Doc.*, Chamber, Session 2015-2016, 54-1986/001, p. 91).

2. <u>As to the law applicable to the consideration of the second and third arguments</u>

Kazakhstan bases its request to set aside the exequatur order on Article 1704, §3 of the Judicial Code.

However, and as explained above, the transitional regime provided for in Article 59 of the Law of 24 June 2013 is not applicable to foreign arbitrations so that Part VI of the Judicial Code as amended by the Law of 24 June 2013 is directly applicable in this case.

In so far as necessary, the Court notes that both Belgium and Sweden are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958, which is therefore, in principle, intended to apply.

Article VII, 1, of the New York Convention, however, provides that:

> *"The provisions of this Convention shall not affect the validity of multilateral or bilateral agreements concluded by Contracting States relating to the recognition and enforcement of arbitral awards and shall not deprive any interested party of the right it may have to rely on an arbitral award in the manner and to the extent permitted by the laws or treaties of the country where the award is relied upon.*

Article VII of the New York Convention therefore allows the party seeking enforcement of the award to rely on the provisions relating to the enforcement of arbitral awards, which are more favourable to exequatur, in force in the country in which exequatur is sought, in this case Belgium, but only for the purposes of *favor arbitrandum*, i.e., for the purposes of the widest possible recognition of foreign[4]arbitral awards.

In fact, *"the most favourable law provision (MFL) is a consequence of the purpose of the Convention which is to facilitate the enforcement of foreign arbitral awards*. *It incorporates the principle that if the requirements of the Convention are not met, the award may still be enforced on another basis... The idea behind the MFL provision is to make it possible to enforce foreign awards in as many cases as possible"[5].*

In the present case, the Stati expressly elected Belgian law in their application for exequatur, considering it to comprise a regime more favourable to arbitration than that provided for in the New York Convention. In its most recent submissions, Kazakhstan

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[4] see in this sense not. HANOTIAU B. and DUQUESNE B., "L'exécution en Belgique des sentences arbitrales belges et étrangères [Enforcement of Belgian and foreign arbitral awards in Belgium]", *J.T.*, 1997/17, n° 5841, n° 15-17; see also EKELMANS M., "des différents régimes juridiques applicables à l'exequatur d'une sentence arbitrale rendue aux Pays-Bas [Different judicial regimes applicable to exequatur of an arbitral award made in the Netherlands]", *R.G.D.C.*, 2001, p. 542; LEFEBVRE P. and SERVAIS M., "les différents régimes organisant la reconnaissance et l'exécution des sentences arbitrales établis par la Convention de New York du 10 juin 1958 et leur coexistence avec d'autres conventions ainsi que avec les dispositions de droit national [the different regimes for recognition and enforcement of arbitral awards under the New York Convention of 10 June 1958 and their co-existence with other conventions and the provisions of national law], *b-Arbitra*, 2018, liv. 2, pp. 251-300.

[5] VAN DEN BERG A.-J., *The New York Arbitration Convention of 1958*, Kluwer, 1981, p.82.

takes note of this choice and takes from it as a consequence that only *"the reasons for refusal of exequatur will be argued according to the Belgian law regime provided for by the Judicial Code"* (third submissions of Kazakhstan, §860, p. 215).

Consequently, the new Articles 1719 to 1721 of the Judicial Code will be applied.

The court may therefore only withdraw the exequatur order once it has established, as the case may be, the existence of one of the circumstances listed in the new Article 1721, §1 of the Judicial Code.

3. <u>As to the admissibility of the second and third arguments (principles)</u>

3.1. <u>On the res judicata authority of the arbitral award</u>

The Stati insist on the res judicata authority of the arbitral award in dispute and the prohibition on the exequatur judge from reviewing the merits of the award.

These principles are neither contested nor contestable. Nevertheless, they do not exempt the exequatur judge from examining the conditions for granting exequatur as defined in Article 1721, §1 of the Judicial Code.

The question of the definition of Belgian international public policy and the scope of the review by the exequatur judge is a matter for consideration of the merits of the argument.

3.2. <u>On the res judicata authority of the judgement of the Court of Svea of 9 December 2016 (principles)</u>

The Stati also rely on the res judicata authority of the decision of the Court of Svea of 9 December 2016 and, to this end, request the court to recognise it in accordance with Articles 22 et seq. of the CODIP [Code of Private International Law].

Kazakhstan, for its part, takes the view that such recognition is not possible in the absence of the CODIP [Code of Private International Law] being applicable in arbitration matters.

a) <u>application of the Code of Private International Law (hereinafter the "CODIP"):</u>

Article 2 of the CODIP provides that:

> *"Subject to the application of international treaties, the law of the European Union or provisions contained in particular laws, the present law governs, in an international situation, the jurisdiction of Belgian courts, the determination of the applicable law and the conditions for the effectiveness in Belgium of foreign judicial decisions and authentic instruments in civil and commercial matters".*

The CODIP therefore establishes a supplementary regime, of which the matters covered must be broadly[6]in agreement.

The preparatory discussions for the Act establishing the Code of Private International Law indicate that the reference to civil and commercial matters does not in itself exclude arbitration as a matter[7]. In other words, *"the mere fact that the issue at the centre of the dispute relates to arbitration does not entail the outright rejection of the Code of Private International Law"[8].*

Thus, and in the absence of an international treaty or other possible normative basis, the recognition of a foreign judicial decision that has ruled on an application to set aside an arbitral award is assessed on the basis of Articles 22 et seq. of the CODIP[9].

In the present case, in the absence of an international treaty between Belgium and Sweden on the recognition and enforcement of judicial decisions in arbitration matters, the supplementary rules provided for by the CODIP apply to the judgement of the Svea Court.

b) <u>Scope of recognition of the Svea Court judgement:</u>

Unlike French law, which does not seem to recognise any international effect to decisions made following proceedings to set aside an arbitral award, Belgian law more readily recognises extraterritorial effects to a foreign decision in arbitration matters.

Since it is understood that the provisions of the CODIP on the recognition of foreign judicial decisions apply to arbitration, the extraterritorial effects of a foreign decision are not limited to those referred to in Article 1721, §1, a) vi) of the Judicial Code.

Thus, one of the essential extraterritorial effects of a foreign judicial decision is reflected in Article 22 of the CODIP, which sets out the principle of recognition of such a decision by right and without procedure in the Belgian legal system.

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[6] MR. FALLON, "Article 2", in J. Erauw inter alia. (eds.), *Le code de Droit international privé commenté [Commentary on the International Private Law Code]*, Brussels, Bruylant, 2006, p. 9.
[7] *Parl.Doc.* Senate, sess. extr. 2003, No. 3-27/1, p. 26.
[8] D. MATRAY and G. MATRAY, "L'exécution sur le territoire belge des sentences arbitrales étrangères annulées dans leur pays d'origine [Enforcement on Belgian territory of foreign arbitral awards which have been set aside in their country of origin]", *Liber amicorum Glansdorff and Legros*, 2015, p. 674.
[9] see in this sense Y. HERINCKX, "Registration fees and arbitral awards", *b-Arbitra*, 2013/2, p. 298; C. VERBRUGGEN, "*Annulment* and enforcement of arbitral awards in Belgium", *in Annulment and enforcement of arbitral awards from a comparative law perspective - Contribution from Cepani 40 colloquium held on 18 October 2018*, Kluwer, 2018, p. 17; A. HANSEBOUT, "De actualiteit van de arbitrale uitspraak: een conflict tussen het exequatuurvonnis en het vemietigingsvonnis. Noot onder Beslagr. Brussel (Fr.) 8 juni 2017", *b-Arbitra*, 2018/1, p. 99; Civ. Brussels, 8 June 2017 (Chamber of seizures), *b-Arbitra*, 2017/2, p. 301.

Article 25, §2 of the CODIP stipulates that *"in no case may the foreign judicial decision be reviewed on the merits"*.

The latter provision therefore prohibits the court of the requested State from extending its review to the manner in which the foreign court has decided the points of fact and law submitted to it.

Nevertheless, Article 25, §1 of the CODIP allows the Belgian court not to recognise a foreign judgement in certain listed limited circumstances. In this sense, it is possible to speak of the potentially limited international effects of a foreign decision ruling on an action to set aside.

Article 25, §1 states in particular that:

> *"a foreign judicial decision is neither recognised nor declared enforceable if:*
> *1° the effect of the recognition or declaration of enforceability would be manifestly incompatible with public policy; this incompatibility shall be assessed taking into account, in particular, the strength of the connection of the situation with the Belgian legal system and the seriousness of the effect thus produced;*
> *2° the rights of defence have been infringed".*

Article 26, §1 paragraph 2 also provides that:

> *"the findings made by the foreign judge shall be set aside to the extent that they would produce an effect manifestly incompatible with public policy".*

Moreover, the recognition of a foreign decision rejecting an application to set aside an arbitral award also has a territorially limited impact to the extent that *"the Belgian Judge may refuse exequatur of a foreign arbitral award which the courts of the State of the seat have refused to set aside"*[10].

c) <u>*Effects of this recognition:*</u>

Article 22, §3, 2° of the CODIP specifies that *"recognition establishes as a matter of law what has been decided abroad"*.

In other words, *"the effect of recognition is, in particular, to admit in Belgium the authority of res judicata which makes it possible, on the positive side, to establish (in an indisputable manner, between the parties and, subject to proof to the contrary, with regard to third parties) what has been decided*

[10] P. COLLE and H. BOULARBAH, "de invloed van het bestaan van mogelijke nietigheidsgronden op het exequatur van een buitenlandse scheidsrecheterlijke uitspraak", in *Liber Amicorum JozefVan den Heuvel*, Antwerp, Kluwer, 1999, p. 178.

abroad and, on the negative side, to oppose the suspension of res judicata preventing the reiteration of the application in Belgium"[11] [12]*.*

Article 23 of the Judicial Code provides for its part that:

> *"The authority of res judicata applies only with respect to what was the subject of the decision. The subject sought must be the same; the claim must be based on the same cause of action, whatever the legal basis; the claim must be between the same parties, and brought by and against them in the same capacity.*

It follows from the consistent case law of the Court of Cassation that:

"The authority of res judicata relates to what the judge has decided on a point of contention and to what, because of the dispute brought before him and subject to the argument by the parties, constitutes, even if implicitly, the necessary basis for his decision.
The fact that there is no identity between the subject and cause of action of an action which has been finally adjudged and those of another action subsequently brought between the same parties does not necessarily imply that such identity does not exist with respect to any claim or dispute raised by a party in either proceeding, nor, therefore, that the judge may accept a claim whose basis is irreconcilable with the previously judged matter"[12]*.*

In the present case, Kazakhstan maintains that recognition of the judgement of the Court of Svea could not be allowed under Articles 25 §1, 1° and 2° and 26 §1, paragraph 2 of the CODIP.

It will be for the court to examine to what extent the Svea Court has already decided one or other of the arguments relied on by Kazakhstan before the court in this case.

If so, the exequatur judge will have to examine whether the res judicata authority of the foreign decision does not produce an effect incompatible with Belgian international public policy prohibited by Articles 25 §1 1° and 26 §1 paragraph 2 of the CODIP or an infringement of the rights of defence prohibited by Article 25 §1 2° of the CODIP.

If not, the exequatur judge may directly exercise his power to review the effects of the arbitral award, as defined by Article 1721, §1 of the Judicial Code.

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[11] H. BOULARBAH, "Efficacité des jugements et actes authentiques [Effectiveness of judgements and authenticated deeds]", in "Le nouveau droit international privé belge [The new Belgian private international law]," *JT*, 2005, para. 81.
[12] Cass, judgement No. C.13.0338.F of 16 April 2015, available at www.juridat.be; see also Cass, 8 March 2013, *Pas*, I, 2013, p. 624; Cass. 31 January 2013, *Pas*, I, 2013, p. 266; Cass. 4 December 2008, *JT.*, 2009, p. 303.

3.3. On the res judicata authority of other judicial decisions

The same reasoning applies to foreign decisions dealing with the Stati's application for exequatur.

The extraterritorial effects of these various decisions will be all the more tenuous as they are not intended to affect the question of the enforcement of the disputed awards in Belgium.

In this sense, the Stati moreover admit the fact that decisions to grant or refuse exequatur have effect only within the territory where exequatur is sought (see the conclusions of the Stati, §451, p. 176).

4. As to the second argument of the existence of fraud

Kazakhstan continues to seek to set aside the exequatur order, also relying on the existence of fraud attributable to the Stati and of such a nature as to vitiate the entire arbitral proceedings.

4.1. On the belatedness of the argument

The Stati take the view that the allegations of fraud are inadmissible in that they should have been raised in good time, i.e. before the arbitral tribunals.

Article 1679 of the Judicial Code effectively provides that:

> *"A party who, knowingly and without reasonable cause, fails to raise an irregularity before the arbitral tribunal in proper time shall be deemed to have waived the right to rely on it.*

It is for the party relying on this provision to prove that the other party had actual knowledge of the irregularity which it failed to raise. The mere fact that the party could or should have known of this irregularity shall not be construed as a waiver of the right to rely on it.

In the present case, and contrary to what the Stati argue, the testimonies of Ms. Nacimiento and Mr. Carrington, both counsel for Kazakhstan, do not prove that the latter had undoubted knowledge of the fraud during the arbitration proceedings.

At most, these testimonies demonstrate that Kazakhstan could have been informed of the Vitol arbitration and could have been in possession of the Perkwood contract, one element among others on which Kazakhstan is now basing its allegations of fraud. They are not enough to prove

that Kazakhstan was aware of the fraudulent concealment of Perkwood's status as a related party, nor a fortiori that it was aware of what it later denounced as fraudulent inflated investment costs.

The second argument is therefore not raised belatedly.

4.2. On the res judicata authority of the judgement of 9 December 2016 of the Court of Svea (application)

In accordance with Article 1721, §1, b) of the Judicial Code, the Belgian exequatur judge must, inter alia, verify ex officio the compatibility of the arbitral award with Belgian public policy. It is not for the exequatur judge to verify the compatibility of the arbitral award with the public policy of another country, even if that country is the place of arbitration. Conversely, no foreign judge seized of an application for setting aside an arbitral award or an application for exequatur can rule on the compliance of the award with Belgian public policy.

In its judgement of 10 August 2018, the Court of Appeal in London noted that public policy is a matter for each court to assess and that the English judge was not bound by the Svea Court's assessment in respect of Swedish public policy (Exhibit 3.9, §38, Stati case file).

In its examination of the argument relating to fraud, the Svea Court, for its part, noted that its review was limited to the compliance of the arbitral award with Swedish public policy. And the Court clarified the scope of the concept of Swedish public policy in the following terms:

- "*According to Article 33 (1) (2) of the SAA* (Swedish Arbitration Act) *an award is invalid if it, or the manner in which it is made, is clearly incompatible with the fundamental principles of the Swedish legal system*. *Swedish law takes a restrictive approach to the possibility of having an arbitral award set aside in accordance with the above-mentioned provision. The legislative history of the provision makes it clear that its purpose is to cover only extremely complex cases and that, because of its narrow scope, it will be applicable only very rarely, apart from covering cases where fundamental legal principles of a procedural or substantive nature have been ignored (…)"* (Exhibit 2.1, Item 5.2.1, p. 32, Stati Group's file, uncontested free translation);

- *"Awards based on false evidence appear to be covered by the term public policy."* (Exhibit 2.1, Item 5.2.1, p. 33, Stati Group's file, uncontested free translation);

- *"the scope of the public policy provision is very narrow, and the legislature was also clearly led not to introduce a provision in the Arbitration Act corresponding to the case review mechanism. In the Court's view, therefore, there should be no question of setting aside an award solely because false evidence or misrepresentations have been presented when it is not clear that they were directly*

decisive of the result (...). However, it is possible to envisage situations where raising a false statement may have an indirect effect on the tribunal in its consideration of the dispute. However, in view of the narrow scope and the restrictive character which should prevail when contemplating opening up a substantive re-examination of the issue in dispute in the context of proceedings to set aside, there should be no question, in the Court's view, of allowing such an indirect influence on the arbitral tribunal such that the award may be considered invalid other than where it is clear that this indirect influence has had a decisive impact on the outcome of the case" (Exhibit 2.1, Item 5.3.1, p. 36, Stati Group file, uncontested free translation).

Next, the Svea Court summarised specifically that it *"finds that none of the circumstances relied on by Kazakhstan here, individually or as a whole, is such that the award, or the manner in which it was made, is clearly incompatible with the fundamental principles of Swedish law"* (Exhibit 2.1, paragraph 5.3.1., p. 37, Stati Group file, uncontested free translation).

On the other hand, and as the High Court in London rightly noted in its judgement of 6 June 2017 (Exhibit 4.1, §§80 et seq., Stati case file), the Svea Court did not rule on the existence of fraud affecting the financial statements.

Indeed, the Svea Court held that:

- the evidence adduced by the Stati Group, which was characterised as false by Kazakhstan, did not directly affect the outcome of the arbitration, since the arbitral tribunal based its decision on another element, namely the indicative offer of KMG;
- KMP's indicative offer was not in itself false evidence, *'although <u>potentially</u> incorrect details of the amount invested in the LPG plant through the annual reports of Tristan OU, KPM and TNG were among the factors that KMG took into account when calculating the offer amount. The <u>allegedly</u> false information in the annual reports is therefore not directly related to the tribunal's decision regarding the value of the LPG plant"* (Exhibit 2.1, item 5.3.1, p. 37, Stati file, emphasis added by the tribunal);
- the possible concealment of certain information by the Stati Group is not a ground for invalidating the award in view of the very narrow scope of the concept of Swedish public policy.

It is thus established that at no time does the Swedish decision settle the question of the existence of fraud committed by the Stati.

The fact that Kazakhstan presented the same factual elements before the Court of this case as those presented before the Court of Svea (see the comparative table drawn up by the Stati Group in its submissions, pp. 148-149) and the same characterisation of these elements as fraudulent manoeuvres is not sufficient to conclude that the authority of res judicata exists, in the absence of a position taken by

the judicial body on the veracity of these factual elements and their correct characterisation in law. In other words, although the question of fraud was indeed submitted to the Swedish courts, it nonetheless remains the case they did not decide it.

The Stati also argue that the Swedish decision decided the question of the causal link between the possible fraud and the outcome of the arbitration.

However, in the same way that it was unable to review compliance with Belgian international public policy, the Swedish Court was unable to rule on the Belgian concept of the causal link. Whatever the similarities between the two national laws in this area, it is sufficient to note that the Court of Svea used the concepts of "direct" or "indirect" influence, having a "decisive impact" or not on the outcome of the award, and whose consequences differ from the principles of causation in Belgian law.

Consequently, the res judicata authority of the judgement of the Court of Svea does not exempt the court from examining the award under Belgian law, and more particularly Article 1721, §1 a) ii) and b) of the Judicial Code.

4.3 On the basis of the second argument relating to breach of public policy

a) Definition of public policy

It is accepted that when they appear in the conditions required to obtain exequatur of a foreign award, the words "public policy" are to be understood in the sense of "international public policy"[13].

Belgian international public policy is defined by the Court of Cassation in the field of private international law as the set of rules by which the legislature intended to enshrine a principle which it considers essential to the moral, political or economic order and which, for that reason, must necessarily exclude the application in Belgium of any rule contrary to or different from a foreign[14]law.

Finally, unlike Article 1717 §3 b) iii) of the Judicial Code, which identifies fraud as one of the grounds for setting aside an arbitral award, Article 1721 §1 b) does not include fraud as a ground for revoking the exequatur order.

However, it is neither disputed nor disputable that fraud may play a part in breach of public[15]order.

[13] see E. KRINGS and L. MATRA Y, "Le juge et l'arbitre[The Judge and the arbitrator", *R.D.I.D.C.*, 1982, p.245.
[14] see Cass., 4 May 1950, *Pas.*, 1950,1, p. 624; and more recently Cass., 18 June 2007, *R. T.D.F.*, 2007/4, pp. 1127-1130.
[15] see C. VERBRUGGEN, 6.3. “Award Obtained by Fraud", in *Arbitration in Belgium*. *A practitioner's guide*, Kluwer Law International, 2016, p. 482, No. 98

b) Scope of the review in respect of international public policy by the exequatur judge

The French Court of Cassation has adopted a so-called restrictive approach, according to which the review of the compatibility of an arbitral award with international public policy by the judge making the setting aside decision should be limited to the flagrant, effective and concrete nature of the alleged[16]violation.

For its part, the CJEU seems to have adopted an extensive approach, holding that:

"The requirements of the efficiency of the arbitral procedure justify that the review of arbitral awards should be limited and that the setting aside of an award should be possible only in exceptional cases (...) However, the Court has already held that, to the extent that a national court must, in accordance with its national rules of procedure, allow an application for setting aside of an arbitral award based on disregard of national rules of public policy, it must also allow such an application based on disregard of Community rules of that kind (…)
In the light of the foregoing, the answer to the question referred must be that the Directive must be interpreted as meaning that a national court hearing an action for annulment of an arbitral award must assess the nullity of the arbitration agreement and set aside that award on the ground that the agreement contains an unfair term, even though the consumer has relied on that nullity not in the arbitration proceedings but only in the action to set aside."[17]

In Belgium, the Court of Cassation has not yet expressly pronounced on the rigour of the review of international public policy by the judge hearing an application to set aside an international award or that of the exequatur.

According to the principle of *favor arbitrandum,* the interpretation of the grounds for refusal of exequatur should be restrictive and promote the portability of arbitral awards.

However, the restrictive interpretation of the grounds for refusal of exequatur does not preclude an effective review of the effect of a foreign award on Belgian international public policy. The effectiveness of such a review implies an understanding of the factual and legal elements in order to verify the alignment of the solution chosen by the arbitrator with Belgian[18]international public policy.

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[16] see Cass, fr., 4 June 2008, Case. N° 06-15.360 available on Légifrance and in *Rev. arb.*, 2008, p. 473.
[17] CJEU 26 October 2006, *Elisa Maria Mostaza Claro v. Centra Movil Milenium SL,* Case C-168/05.
[18] see in this sense, P. LEFEBVRE and M. SERVAIS, "vers une conception large de l'ordre public à l'instar de la portée qui lui est conférée dans le cadre de l'annulation de sentences arbitrales [Towards a broad concept of public policy in the scope given to it in setting aside arbitral awards]", *b-Arbitra*, 2014/2, p. 333; B. HANOTIAU and O. CAPRASSE, "L'annulation des sentences arbitrales [Setting aside arbitral awards]", *J. T.*, 2004, p. 418.

Fraud is precisely one of those elements of fact, the existence of which the exequatur judge may assess without there being any question of a review of the merits of the sentence.

A full and complete review of the existence of fraud is all the more justified since there is no recourse in arbitration comparable to the civil claim allowing the revocation of judicial decisions that have become res judicata as provided for in Articles 1132 et seq. of the Judicial Code. .

On the other hand, fraud can only be considered as a ground for refusal of exequatur if it is established that it had an impact on the arbitral award. This examination of the impact of the fraud on the award is justified by the fact that it is a matter for the exequatur judge to assess only whether the enforcement of the award itself is contrary to Belgian international public policy, and not to review the merits of the dispute submitted to arbitration. Thus, *"even assuming that the award contains a violation of public policy, it should not be set aside if there is otherwise sufficient reason to justify the same final outcome in the dispute in question"*[19].

This requirement of causation between the fraud and the outcome of the award makes it possible to reconcile two imperatives which are imposed on the exequatur judge : to ensure effective protection of the public order of which he is the guardian, on the one hand, and not to proceed to a review of the merits of the sentence, on the other hand.

Moreover, the *favor arbitrandum* requires the exequatur judge also to find that the fraud relied on had a clear and definite impact on the award, or, in other words, that it is *"the decisive cause"*[20].

Furthermore, Article 1721, §1, b) ii) of the Judicial Code provides that the court shall refuse to declare an arbitral award enforceable only if it finds that *"the enforcement of the award would be contrary to public policy"*.

Contrary to what Kazakhstan maintains, it is therefore the effect of the enforcement of the award in Belgium that must be analysed, and not the award itself.

Finally, the terms of Article 1721, §1(b)(ii) above also involve taking into account the strength of the situation's links with the Belgian[21] legal system.

c) <u>Application in this case</u>

In the present case, Kazakhstan complains of two types of fraud:

[19] B. HANOTIAU and O. CAPRASSE, *op.cit.*, p. 418.
[20] G. KEUTGEN and A. DAL, *L'arbitrage en droit belge [Arbitration in Belgian and international law]*, Tome I, Bruylant, 3enrc ed. 2015, p.549, n° 685.
[21] see in this sense, R. JAFFERALI, "l'ordre public, de l'arbitrage international aux conflits de juridictions [Public policy, from international arbitration to the conflict of laws]", in *Liber amicorum Nadine Watté*, Bruylant, 2017, p. 326.

- a first series of frauds committed by the Stati with the aim of inflating the investment costs for the construction of the LPG Plant;
- a second fraud aimed at inflating their damages by concluding the Laren transaction.

The arbitral tribunal noted the terms of Article 13(1) of the ECT, which deals with "compensation" to indemnify investors in the event of expropriation, and under which:

"This compensation shall be equal to the fair market value of the expropriated investment at the time immediately preceding the time when the expropriation or the announcement of the expropriation became officially known and affected the value of the investment, hereinafter referred to as the '*Valuation Date'*. "(Exhibit 1.1, arbitral award, §1460, Stati file).

This provision gives the arbitrator a broad discretion as to the quantum of the compensation, the fair market value, which he determines in equity.

Regarding the assessment of damages due for the LPG Plant, the arbitral tribunal first held that "*the best source of assessment"* were the contemporaneous offers made by third parties who estimated the plant at USD 150 million on average *"not as salvage value, but for possible operation"*. In doing so, the arbitral tribunal therefore favoured the value set on the basis of expected future profits. In this respect, it followed the position of Kazakhstan, for which neither the investment value nor the book value *"defined as the investment value less accumulated depreciation"* was relevant for the assessment of fair market value (see arbitral award, §§1724 and 1725).

The arbitral tribunal then adopted the amount stated in KMG's indicative offer, considering *"this value to be the best relative source of information"* (arbitral award, §1747).

It is clear from the documents filed that:

- the *due diligence* report drawn up by the audit firm KPMG on 29 August 2008 states at the outset and in the introduction that the audit does not provide any opinion or certification whatsoever on the financial statements for the years 2006 and 2007 (Exhibit 6.7.b, p.2, Stati file).
- The Confidential Memorandum on the Zenith Project distributed to potential purchasers also expressly expresses all reservations as to the correctness, accuracy and completeness of the information it disseminates, including therefore on the financial statements for the years 2006 and 2007 (Exhibit 6.27, pp. 1 and 2, Stati file).
- KMG's Indicative Offer indicates that it has relied on the Memorandum and "other publicly available information". The Indicative Offer also specifies that, in the absence of

sufficient information, the purchase value of the LPG Plant was calculated using a combination of two valuation methods: the comparative method and the historical cost method (Exhibit 6.20, p.1076, Stati file). The Memorandum was therefore only one source among others used for the valuation of the LPG Plant included in the overall Indicative Offer, while the investment cost method was not the only basis for the valuation of the purchase value of the LPG Plant used by KMG.

The arbitral tribunal ruled, in fairness, taking into account both the indicative offers of third parties based on expected future revenues and the indicative offer of KMG, itself based only partly on the Memorandum, which was fully explicit about its own limitations.

In addition, the fair market value of the LPG Plant was set by the arbitral tribunal at USD 199,000,000, whereas the Stati were claiming compensation valued at USD 329,077,000, i.e. the investment costs which they estimated at USD 245,000,000 plus the future value above cost.

Contrary to Kazakhstan's contention, the mere fact that the arbitral tribunal took note of the Stati's position that they had invested USD 245,000,000 for the LPG Plant does not suffice to establish that this element was decisive in the assessment of the damage, whereas, on the contrary, the arbitral tribunal expressly stated that the offers of third parties, calculated on the basis of possible future operation, represented the best source of assessment.

In these circumstances, it has not been established that the arbitral tribunal would have considered the investment costs in determining the fair market value of the LPG Plant.

In this sense, the Court of Svea further held that *"the allegedly false information in the annual reports is therefore not directly related to the tribunal's decision regarding the value of the LPG Plant"* (Exhibit 2.1., p. 37, Stati file, uncontested free translation).

In other words, Kazakhstan fails to provide evidence of the decisive causal link between the allegedly fictitious inflation of the 2006 and 2007 financial statements and the quantum of the damage as determined in equity by the arbitral tribunal.

As to the fraud inferred from the Laren transaction, Kazakhstan argues that the Stati misled the arbitral tribunal by claiming that:

- Laren was not a related party;
- the lack of liquidity was due to Kazakhstan's actions;
- the opportunity to conclude a 15% loan with Credit Suisse had been lost due to the actions of Kazakhstan, while an internal memo from the financial advisors of the Stati

would establish that they decided, of their own free will, to forego a loan at an effective rate of 44.7%.

The arbitral tribunal held in respect of the Laren transaction that:

"1413. Furthermore, the Tribunal is not persuaded by the Respondent's argument that the Applicants have not proven that the actions of the MERM caused the refusal of the loan agreement by Credit Suisse. Moody's and Fitch have confirmed that the actions of MERM against KPM and TNG have raised concerns about the companies' ability to service their existing debt. The Tribunal agrees with the Applicants that it would have been surprising if a lender had provided new financing without the Applicants' disputes with the Government of Kazakhstan being resolved.
1414. It is clear that, even before Mr. Cornegruta's trial, the relentless onslaught of inspections and, potentially, charges against most of KPM's senior executives, when taken together with these pre-trial asset seizures on 30 April 2009, have handicapped the Applicants' companies.
1415. The Parties agree, as does the Tribunal, that the Applicants were only able to weather the summer 2009 storm by obtaining financing through the Laren loan. (...). The Parties agree, as does the Tribunal that the terms of the Laren loan were disastrous for the Applicants. (...). In addition, the Parties agree, as does the Tribunal that if the Applicants had obtained financing from Credit Suisse in December 2008, they would not have needed to rely on other lenders in June 2009. (...). The Parties dispute that Respondent's actions induced the Applicants to take out the Laren Loan. The Tribunal finds that the Laren loan, with its onerous terms, was contracted in June 2009 because KPM and TNG were required to secure these funds and the actions of the Defendant prevented them from doing so earlier. As of June 2009, ordinary lenders would not have provided loans to these companies on commercial terms. Although the Applicants negotiated as much as they could, the cumulative effect of the avalanche of inspections and the public disclosure in December 2008 of allegations of fraud and forgery in connection with the transfer of Terra Raf, as mentioned above, resulted in significant downgrades by the rating agencies Moody's and Fitch. Whereas the global economic crisis affected these companies in late 2008 and early 2009, concerted and aggressive state actions, including inspections, criminal charges and asset seizures, even before Mr. Cornegruta's trial in August and December 2009, forced the Applicants to accept the "appalling" Laren loan.
1417. In addition, the Tribunal notes that, despite TNG's obvious attempts to satisfy Kazakhstan's claims, the State never responded to TNG's requests of 24 and 25 March 2009, requests which the State had demanded. Therefore, Kazakhstan's alleged claim concerning pre-emption rights remained for the next two years. This was undoubtedly a shadow on the property rights of Terra Raf which created persistent difficulties for the Applicants" (arbitral award, p. 320).

By putting in issue the consequences of its actions on the conclusion of the Laren transaction, Kazakhstan is in fact returning to the merits of the dispute as decided by the arbitral tribunal, and which it is not for the exequatur judge to revisit.

With regard to Laren's status as a related party, the arbitral tribunal noted the parties' opposing positions (see for the Stati, Exhibit 8.34 of the Kazakhstan file, the submissions in the arbitration, §354, and for Kazakhstan, the arbitral award, §1349), without, however, considering that this justified ruling out the damage resulting from this transaction. The arbitral tribunal was therefore not misled on this element, which was the subject of an adversarial debate.

Furthermore, the Tribunal notes that the internal memorandum relied upon by Kazakhstan expressly states that the rate proposed by Credit Suisse was 15%, that the actual interest rate of 44.7% took into account all transaction costs and that the loan had to be foregone due, inter alia, to the constraints and uncertain environment in which the Stati found themselves (see Exhibit 8.19.b, Kazakhstan file). Consequently, there is also no reason to believe that the arbitral tribunal was misled as to the rate proposed by Credit Suisse and the reasons for foregoing the loan.

Finally, the arbitral tribunal held that Kazakhstan's actions were causally related to the Stati's lack of liquidity, but did not hold them to be the exclusive cause. This impact, even partial, of Kazakhstan's actions on the Stati's liquidity problems was sufficient, in the opinion of the arbitral tribunal, to found Kazakhstan's liability.

Therefore, the fact that the Stati are themselves partly responsible for their liquidity problems does not alter the finding of the arbitral tribunal.

In the end, Kazakhstan has not established that the arbitral tribunal was misled as to the causes of the Laren transaction, nor does it establish that this alleged misleading statement would have affected the outcome of the award.

As a result of the foregoing arguments, Kazakhstan has not adduced evidence that the alleged frauds had a clear and definite impact on the outcome of the award, or, in other words, that they were *"the decisive cause"*.

As a consequence, Kazakhstan has also failed to establish how the alleged fraudulent manoeuvres would have the effect of rendering the recognition or enforcement of the arbitral award contrary to Belgian international public policy.

The absence of a causal link between the alleged frauds and the infringement of Belgian international public policy is further reinforced by the tenuous, or even non-existent, link between the situation and the Belgian legal system.

Indeed, this case concerns a dispute between a State, Kazakhstan, and Moldovan investors whose installations were expropriated in Kazakhstan, which was decided by a Swedish arbitral tribunal in application of foreign law and not Belgian law, and subject to review by Swedish courts.

The ground contained in Article 1721, §1, b) of the Judicial Code has not been met.

4.4. On the basis of the second argument, that the party against whom the award is made is unable to assert his rights

Kazakhstan also complains against the Stati that they prevented it from challenging the investment costs of the LPG Plant before the arbitration tribunal by hiding their relations with the companies Azalia and Perkwood from it.

Article 1721, §1, a) ii) of the Judicial Code provides that the court shall refuse to declare an arbitral award enforceable at the request of the party against whom it is relied on if that party proves *"that it was impossible for another reason for him to assert his rights; in such cases, however,* the *declaration of enforceability of the arbitral award may not be refused if it is established that the irregularity did not affect* the arbitral award".

Kazakhstan argues that if it had been aware of the frauds it complains of today during the arbitration proceedings, the debate on the cost of the LPG Plant would have been quite different.

As developed above, the causal link between the alleged frauds and the outcome of the arbitral award is absent, so that this ground for refusal of exequatur is not admissible.

The second argument will therefore be rejected.

5. As to the third plea alleging irregularity of the arbitral proceedings

Kazakhstan seeks to annul the exequatur order by relying on the irregularity of the appointment of an arbitrator by default and on its behalf and the failure to comply with the three-month waiting period prescribed by Article 26 §2 of the ECT.

5.1. On the violation of the mandatory waiting period *("cooling off period")*

Kazakhstan takes the view that the 3-month waiting period prescribed by Article 26 §2 of the ECT was not observed and that the dispute was therefore not validly referred to the arbitral tribunal.

As regards the substance, the Stati maintain in particular that the arbitration procedure was suspended for three months at the request of Kazakhstan in order to authorise the negotiations provided for in the above-mentioned Article 26 and thus enable this irregularity to be corrected.

The Stati principally rely on the res judicata authority of the decision of the Court of Svea in order to conclude that the plea is inadmissible.

In addition to the principles mentioned in point 3.2 above, it should also be recalled that in order to delimit the res judicata benefiting from this authority, it is necessary to *"compare what has been previously judged on a contentious point and what is currently before the judge, the comparison relating both to the facts and to the rule of law applied to them; in a word, it is necessary to examine whether the new claim can be admitted without destroying the benefit of the previous decision"*[22].

In its judgement of 9 December 2016, the Svea Court ruled on the question of compliance with the mandatory waiting period and the referral to the arbitral tribunal, holding that Article 26 §2 of the ECT could not be interpreted as setting a condition which must be met in order for the arbitral tribunal to be validly seized. In addition, the Court emphasised that the objective of Article 26 §2 of the ECT could also be achieved if the Arbitral Tribunal decided, as it did in the present case, to suspend the proceedings for a certain period to allow the parties to negotiate.

It must therefore be noted that, faced with the same facts as those submitted to the Swedish Court, namely the possible non-compliance by the Stati with the mandatory waiting period and its impact on the validity of the referral to the arbitral tribunal, this Court is required to interpret the same legal rule as that submitted to the Court of Svea, namely Article 26 §2 of the ECT, and to apply it to those same facts.

Consequently, this court could not decide again the question of compliance with the mandatory waiting period and its impact on the referral to the arbitral tribunal without disregarding the res judicata authority of the decision of the Svea Court.

In so far as it relates to failure to comply with the three-month waiting period prescribed in Article 26 §2 of the ECT, the plea is therefore inadmissible.

5.2. <u>On the improper appointment of an arbitrator by default</u>

Kazakhstan takes the view that the default appointment of Professor Lebedev was unlawful, so that exequatur should be refused in accordance with Article 1721 §1a)i) (invalid arbitration agreement), ii) (failure to inform of the appointment of an arbitrator or of the arbitral proceedings), iii) (dispute not covered by the arbitration agreement) and v) (constitution of

[22] G. DE LEVAL, *Droit judiciaire [Judicial law] - Tome II*, Brussels, Bruylant, 2015, pp.708-709.

of the arbitral tribunal or arbitral proceedings not in accordance with the agreement of the parties) and b) ii) (Contrary to public policy) of the Judicial Code.

In its judgement of 9 December 2016, the Svea Court ruled on the arbitral tribunal's compliance with the SCC rules by holding that:

"The investigation therefore shows that Kazakhstan had the opportunity to respond to the Investors' request for arbitration and that it was then possible for Kazakhstan to appoint an arbitrator. However, neither the instructions nor the recall explicitly stated that an arbitrator was to be appointed by Kazakhstan. The question is whether Kazakhstan was thus deprived of its right to appoint an arbitrator.
(...)
In the Court's view, it is relevant to note that in the instructions in question reference was made to Article 5 of the SCC Rules, which were also attached. In accordance with Article 5, the Respondent shall, where applicable, state the name and address of the arbitrator appointed by him in his statement. In the Request for Arbitration, the Investors requested that the tribunal be composed of three members and it follows from Article 12 of the SCC Rules that the tribunal should be composed of three members, unless the parties have agreed otherwise and the SCC decides that the dispute should be decided by a single arbitrator. In this case, the SCC had not made any such decision. Through the instructions and additional documents attached thereto, Kazakhstan received sufficiently clear information in the Court's opinion that the arbitral tribunal would be composed of three members and that Kazakhstan would have the opportunity to appoint one of them.
Kazakhstan also objected that the time limit for responding to the SCC was too short and that it was difficult to understand SCC documents because they were written in English. As regards the length of the time-limit, the Court notes that it cannot be considered unacceptably short, even from an international perspective. In addition, the fact that Kazakhstan has never contacted the SCC to request an extension of the deadline is of particular importance for the assessment of language and waiting period. The initial instructions contained the names, e-mail addresses and international direct telephone numbers of the officials responsible for the issue. It is also apparent from the SCC rules that it is possible for a party to obtain an extension to a time limit. In *this regard, it should also be taken into account that Kazakhstan had previously been a party to proceedings conducted by the SCC in English*.
As to the question that Kazakhstan has never had an opportunity to comment on the SCC proposal that Sergei Lebedev should be appointed as arbitrator on behalf of Kazakhstan, it is noted that the CCS rules contain no provision for such comment.
(...)
As part of the arbitration agreement, it was decided that the SCC rules applied to the proceedings, including the appointment of arbitrators.
(...)

Of particular interest is Article 13, paragraph 3, which regulates the case where the court is to be composed of several members. The provision stipulates that "where a party fails to appoint an arbitrator within the stipulated period, the board shall make the appointment". However, no mention is made of the time limit for doing so.
Article 13 also contains provisions governing what must be taken into account when the SCC appoints an arbitrator, such as language and nationality. As noted above, however, there is no mention that the party should also be given an opportunity to comment on who should be appointed when the SCC appoints an adjudicator on its behalf. What emerged during the inquiry into the administration of the SCC does not, in the Court's view, show that, with respect to the SCC Rules or the Arbitration Act, a procedural error was made at the commencement of the arbitration and when Sergei Lebedev was appointed. Therefore, the principle that the parties should receive equal treatment cannot be held to have been violated either, in particular in view of the fact that Kazakhstan has received all relevant documents and sufficient time to comment".

In view of the res judicata authority of the Swedish decision, the Court is bound by the position of the Svea Court in holding in the present case that the SCC rules were complied with by the arbitral tribunal.

The Court finds that the procedure as prescribed by the rules of the SCC is not contrary to the fundamental procedural principles of the Belgian legal order.

Consequently and to the extent that it is thus stated as a matter of law that the rules of the SCC were applicable to the arbitration and were complied with, none of the grounds for refusal of exequatur referred to in Article 1721, §1; a) i), iii) and v) of the Judicial Code are admissible.

Moreover, it appears from the documents filed that by 11 August 2010 at the latest, the date on which the competent department within the Kazakh administration received the SCC's letter of August 5, 2010, Kazakhstan was informed of the Stati's choice of a tribunal composed of three arbitrators and of the need for the Republic to choose its own arbitrator.

Indeed, the request for arbitration sent by the SCC indicated the Stati's wish to have recourse to a tribunal composed of three arbitrators and the possible appointment of a default arbitrator for Kazakhstan in accordance with Article 13(3) of the SCC arbitration rules.

The SCC's letter transmitting this request also made express reference to Article 5 of the Rules of Arbitration, which provides that:
"(1) The Secretariat shall send a copy of the Request for Arbitration and the documents attached thereto to Respondent. The Secretariat will set a time limit within which Respondent must submit a Response to the SCC Institute. The Response should contain:

(1) any objection as to the existence, validity or applicability of the arbitration agreement; however, if the Respondent does not raise any objection, it may nevertheless raise such objections subsequently at any time up to and including the filing of the statement of defence;
(H) an acceptance or denial of the subject-matter of the Request for Arbitration;
(iii) a preliminary statement of any counterclaims or counterclaims for set-off;
(iv) any comments on the number of arbitrators and the seat of arbitration; and
(v) if applicable, the name, address, telephone number, fax number and e-mail address of the arbitrator appointed by the Respondent.
(2) The Secretariat will send the Response to the Applicant. The Applicant will have the opportunity to submit comments on the Response.
(3) If the Respondent does not submit a Response, this shall not prevent the arbitration from taking place" (Exhibit 1.30, Stati file).

It is therefore established that Kazakhstan was aware of the precise elements of the reply it had to make to the said letters, including the composition of the arbitral tribunal and the name of the arbitrator it wished to appoint.

The ground for refusal of exequatur under Article 1721, §1, a) ii) of the Judicial Code is therefore not established.

Finally, Kazakhstan maintains that its rights of defence have not been respected by the SCC.

Again, the res judicata authority of the Swedish decision does not allow the court to reconsider the manner in which the SCC applied its regulations. Suffice it to note that the Svea Court held that the SCC had complied with this and that *"the principle that the parties should receive equal treatment cannot be held to have been violated either, particularly in view of the fact that Kazakhstan received all the relevant documents and sufficient time to comment"* (Exhibit 2.1, Stati case file, p. 47).

Moreover, even if it is accepted that respect for the rights of the defence is part of Belgian procedural public policy, it must be noted that in this case Kazakhstan's rights of defence were not overridden.

Indeed, almost four months after the SCC's first request and after four notifications from the SCC, Kazakhstan, for the first time, contested the appointment of Professor Lebedev, without however proposing a name for a substitute arbitrator. The SCC reviewed these submissions and rejected Kazakhstan's challenge after holding that *"no ground for the disqualification of Professor Sergei N. Lebedev has been found"* (Exhibit 1.22, Stati file).

Kazakhstan has therefore had the opportunity to assert its rights in a manner consistent with the fundamental principles of the Belgian international legal order.

To the extent necessary, the argument about the presence of one of the Stati's lawyers at SCC Board meetings is also not relevant. Indeed, it appears from the minutes of the meeting of 15 September 2010 at which Professor Lebedev was appointed that the lawyer in question, Ms. Margrete Stevens, was not present (Exhibit 1.26, Stati file), and from the minutes of the meeting of 15 December 2010 that Ms. Stevens did not take part in the decision on the challenge by Kazakhstan to the appointment of Professor Lebedev (Exhibit 1.21, Stati file).

Consequently, the third argument put forward by Kazakhstan in support of its application to set aside the exequatur order is also rejected.

IV. DECISION

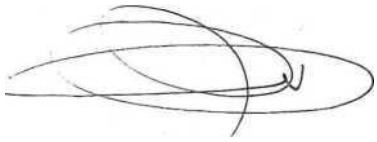
Having regard to the grounds set out above, the Court, ruling after submission of argument:

a) declares Kazakhstan's application admissible but unfounded; consequently, rejects it;

b) orders Kazakhstan to pay the costs of the proceedings against the Respondents in the amount of €36,000;

this is a true and accurate account of the judgment pronounced at the public hearing of the 4th Chamber of the French-speaking Court of First Instance of Brussels, on **20 December 2019**, at which were present and seated:

Ms Sabine MALENGREAU, Judge
Assisted by Ms Leila KHALED, Registrar



KHALED **MALENGREAU**