Judgment No. 133/19 - VIII - Exequatur

CIVIL JUDGMENT - EXEQUATUR

Public Hearing of the Nineteenth of December Two Thousand and Nineteen

Roll number CAL-2018-00013.

Composition:

Lotty PRUSSEN, President of the Chamber;
Monique HENTGEN, Senior Adviser;
Jeanne GUILLAUME, Senior Adviser;
Alain BERNARD, clerk.

Between:

The REPUBLIC OF KAZAKHSTAN, represented by its current President of the Republic and, where necessary, by its current Prime Minister or any other body authorized for the purpose of prosecutions and proceedings by the Department for the provision of courts business under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan) at its address at Dinmukhamed Qonayev Street 39, Astana 010000, Kazakhstan, or otherwise by the Ministry of Justice, represented by the current Minister of Justice, located at 8, Orynbor Street, House of Ministries, Entrance 13, 010000 Astana, the Left bank, Kazakhstan,

Appellant within the meaning of the act of the judicial officer: Véronique REYTER d'Esch-sur-AIzette of 2 November 2017,

appearing on behalf of the public limited company Arendt & Medernach, registered at the Luxembourg Bar, established and having its registered office at L-2082 Luxembourg, 41A, J.F. Kennedy, represented for the purposes hereof **by Maître François KREMER**, lawyer at the Court, resident in Luxembourg,

and:

1) ASCOM GROUP S.A., a company incorporated under Moldovan law, established and having its registered office at MD-2009 Chisinau, Moldova, 75 Mateevici Street, represented by its current Chairman, or by any other body authorised for that purpose,

2) Anatolie STATI, resident at MD-2008 Chisinau, Moldova, 20 Dragomirna Street,

3) Gabriel STATI, resident at MD-2008 Chisinau, Moldova, 1A Ghioceilor Street,

4) TERRA RAF TRANS TRAIDING [*sic*] LTD a Gibraltarian company, set up and having its registered office at 13/1 Line Wall Road, Gibraltar, British Overseas Territory, represented by its current director, or any other body authorised for that purpose,

Respondents for the purposes of the said REYTER Act,

appearing on behalf of the limited liability company NautaDutilh Avocats Luxembourg, registered at the Luxembourg Bar, established and having its registered office at L-1233 Luxembourg, 2, rue Jean Bertholet, represented for the purposes hereof **by Maître Antoine LANIEZ**, lawyer to the Court, resident in Luxembourg.

THE COURT OF APPEAL:

FACTS and MATTERS PERTAINING

Anatolie Stati is the holder of all of the shares of Ascom Group S.A. (hereinafter "Ascom"), a public limited company under Moldovan law. Anatolie Stati and her son Gabriel Stati each hold half of the shares in Terra Raf Trans Traiding [*sic*] Ltd (hereinafter "Terra Raf"), a limited liability company incorporated under the laws of Gibraltar.

Between 1999 and 2005, Anatolie and Gabriel Stati, through Ascom and Terra Raf, acquired 100% of the shares of two Kazakh companies, namely Kazpolmunay LLP (hereinafter "KPM") and Tolkynneftegaz LLP (hereinafter "TNG"), which were authorised by the Republic of Kazakhstan (hereinafter "Kazakhstan") to explore and develop various oil and gas deposits in Kazakhstan pursuant to subsoil exploitation agreements.

KPM is 100% owned by Ascom, which in turn is 100% owned by Anatolie STATI, while TNG is 100% owned by Terra Raf, which in turn is equally owned by Anatolia and Gabriel Stati.

Anatolie Stati is also the 100% owner of Tristan Oil Ltd. (hereinafter "Tristan"), a company in the British Virgin Islands which was created, according to Anatolie and Gabriel Stati, for the sole purpose of financing the activities of KPM and TNG.

In 2006, Ascom (and Terra Raf) via TNG started the project for the construction of a liquefied petroleum gas plant in Kazakhstan (hereinafter "LPG Plant"), in cooperation with the oil company Vitol FSU B. V. (hereinafter "Vitol").

At the end of 2008, the Kazakh authorities reported several serious breaches committed during the operations carried out by KPM and TNG.

On 21 July 2010, the Ministry of Oil and Gas of the Republic of Kazakhstan terminated the land use licences of KPM and TNG. The oil fields have been taken over, through a trust, by the state oil company KazMunaiGas (hereinafter "KMG") and its subsidiary KazMunaiTeniz (hereinafter "KMT").

On 26 July 2010, Anatolie Stati, Gabriel Stati, Ascom and Terra Raf (together "the Stati") filed arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter "SCC Institute") in Sweden, based on the *Energy* Charter Treaty (hereinafter "the ECT"), signed on 17 December 1994, for the promotion and protection of foreign investment in the energy sector.

In an award of 19 December 2013, the arbitral Tribunal found that Kazakhstan had breached its obligations under the ECT with respect to the investments of the Stati and decided that Kazakhstan should pay the Stati the sum of USD 497,685,101.00 plus default interest (of which USD 199,000,000.00 was to be damages and interest for the LPG Plant).

By means of a corrective award of 17 January 2014, the Tribunal made a correction to the costs of the arbitration and fixed the allocation of the arbitrators' fees.

An appeal by Kazakhstan to set aside the arbitration award was dismissed by decision of the Stockholm Court of Appeal (hereinafter "SVEA Court") of 9 December 2016.

An appeal against this decision to the Supreme Court of Sweden has not been allowed.

Various exequatur and enforcement proceedings have been initiated by the Stati in the United States, England, the Netherlands, Belgium, Sweden, Italy and Luxembourg.

PROCEDURE

By Order No. 40/2017 issued on 30 August 2017, a first Vice-President of the District Court of Luxembourg, replacing the President who was legitimately prevented from attending, declared enforceable in the Grand Duchy of Luxembourg, as if it had come from a domestic court, the arbitral award of 19 December 2013, issued by "The Arbitral Tribunal, Arbitration Institute of the Stockholm Chamber of Commerce" consisting of Prof. Karl-Heinz BOCKSTIEGEL, President, David R. HAIGH, QC, Co-arbitrator, and Prof. Sergei N. LEBEDEV, co-arbitrator, (hereinafter "the Award"), as corrected by the Award of 17 January 2014, between the Moldovan company ASCOM GROUP S.A., Anatolie STATI, Gabriel STATI and the Gibraltar company TERRA RAF Trans. Traiding Ltd, on the one hand, and the Republic of KAZAKHSTAN, on the other.

By a writ of summons of 2 November 2017, the Republic of Kazakhstan lodged an appeal under Articles 1250 and 682 of the New Code of Civil Procedure, against the order served on it on 2 October 2017.

The court was asked

- first to declare that the Award is contrary to Luxembourg public policy as it is the product of an offence or fraud,

therefore, under of Article V(2) b) of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention"), alternatively of Articles 1251(2), 1244(10) and 1244(12) of the New Code of Civil Procedure, to refuse or revoke respectively the exequatur Award, or else to order that the exequatur order be amended accordingly and to state that it

is of no have effect whatsoever in the territory of the Grand Duchy of Luxembourg,

- Under the first sub-head, to declare that the essential formal requirements laid down in relation to the documents to be attached to the application for exequatur have not been complied with by the Stati,

consequently, under Article IV(1) a) and b) of the New York Convention, in the second alternative under Article 1250 of the New Code of Civil Procedure, to refuse, respectively to revoke, the exequatur of the Award, alternatively to order that the exequatur order be amended accordingly and to state that it is of no effect whatsoever in the territory of the Grand Duchy of Luxembourg,

- under the second sub-head, to declare that there was no valid arbitration agreement between the Stati and Kazakhstan,

consequently, under Article V(1) a) of the New York Convention, in the second alternative under Article 1244(3) of the New Code of Civil Procedure, as referred to in Article 1251(3) of the New Code of Civil Procedure, to refuse or revoke, respectively, the exequatur of the Award, alternatively to order that the exequatur order be amended accordingly and to state that it is of no effect whatsoever in the territory of the Grand Duchy of Luxembourg,

- Under the third sub-head, to declare that the Award was made by an improperly constituted arbitral tribunal, therefore, under Article V(1) b) and d) of the New York Convention, alternatively under Article 1244(6) of the New Code of Civil Procedure, as referred to in Article 1251(3) of the New Code of Civil Procedure, to refuse or revoke, respectively, the exequatur of the Award, alternatively to order that the exequatur order be amended accordingly and that it is of no effect whatsoever in the territory of the Grand Duchy of Luxembourg,

- under the fourth and final sub-heading, to declare that the Republic of Kazakhstan must enjoy immunity from enforcement, the purpose of which is to protect the property of a sovereign State against all enforcement measures, and that consequently, the Award could not be the subject of the exequatur granted pursuant to the Order of 30 August 2017,

consequently, to refuse or revoke the enforceability of the Award on that ground, alternatively, to order that the exequatur order be amended accordingly and that it is of no effect whatsoever in the territory of the Grand Duchy of Luxembourg.

In any event, Kazakhstan acknowledges that, to the extent necessary, it offers to prove by evidence the following facts:

1. The main equipment of the LPG Plant was delivered, and its installation supervised, by the German company TGE Gas Engineering GmbH (hereinafter "TGE"), for a total amount of approximately EUR 32 million. The Stati - via Azalia 000 (hereinafter "Azalia") and Perkwood Investment Limited (hereinafter "Perkwood") - sold TGE's equipment to Tolkynneftegaz LLP (hereinafter "TNG") for USD 93 million, i.e. the same equipment as that sold by TGE for USD 35 million.

2. Perkwood is a company that was established by Sarah Petre-Mears on 14 September 2005. Throughout the period from September 2005 to July 2010, Perkwood was effectively controlled by the Stati, in particular by virtue of proxies given by Perkwood's sole director, Sarah Petre-Mears, to Anatolie Stati and Gabriel Stati on 2 November 2005, and renewed on an annual basis on 14 September 2006,

22 August 2007 and 26 August 2008, and to Anatolie Stati on 20 August 2009. The persons who acted on behalf of Perkwood in the documents produced by the Stati, however, include other persons, including Mr. Anatolie Stati's personal driver, Mr. Eldar Kazumov, who did not have the knowledge required to authorise such transactions, and whose alleged power to represent Perkwood was never established by the Stati.

3. From 2006 to 2009, Perkwood was a company with no office or employees, and filed dormant accounts with the British Companies House.

4. Azalia is a Russian company, of which the Stati are neither shareholders nor directors. However, the Stati controlled Azalia during the period from September 2005 to July 2010. Azalia's sole director, Mr. Alexey Shorin, has never heard of TGE, Ascom, Perkwood, and TNG. Azalia ceased operations in 2005, prior to the start of construction of the LPG Plant, and had no activity after that date until its liquidation in June 2016.

5. The contract between Perkwood and TNG dated 27 March 2006 (Exhibit 8.3 Arendt) and the various annexes and addenda to this contract were signed on behalf of Perkwood by Elena Ozerova (Ascom's accountant at the time of the events) or Eldar Kasumov (Anatolie Stati's personal driver at the time of the events).

6. In addition to Anatolie Stati, Grigore Pisica and Gheorghe Ciobanu knew that Perkwood was a company related to the Stati. Grigore Pisaca was a witness for the Stati in the Arbitration proceedings.

7. Neither Perkwood nor Azalia are listed as related parties in the 2007, 2008 and 2009 annual accounts of Tristan OU Ltd, KPM and TNG.

8. The letters of representation sent by the Stati to KPMG dated 5 August 2008, 31 March 2009, 25 August 2009, 10 June 2009 and 14 December 2009 relating to the audit of Tristan, KPM and TNG for the 2008 and 2009 financial reports are false and in breach of IAS 24 in that they do not mention that Perkwood and Azalia are related companies of the Stati.

9. The "Information Memorandum" of 8 August 2008 relating to the controlled auction for the sale of KPM and TNG was false because it is based on the 2007, 2008 and 2009 financial reports of Tristan, KPM and TNG, which do not mention Perkwood or Azalia as related parties.

10. After receiving a draft of the KPMG report on August 31, 2008, which mentioned several times that Perkwood was a company related to the Stati, Mr. Artur Lungu returned the draft to KPMG on 8 September 2008, manually deleting the mention "related party". In the final version of the KPMG Report dated 15 September 2008, the erroneous and misleading reference to "third party" appears. This final version of the KPMG Report of 15 September 2008, produced by the Stati during the arbitration, was therefore materially false.

11. In addition, the Stati also created management fees of USD 44 million, which were included in the amount paid by TNG to Perkwood.

By telefax dated 9 October 2019, the representative of Kazakhstan, under Article 418 of the New Code of Civil Procedure, completed the list of witnesses to be summoned.

As an alternative, and to the extent necessary, the appellant acknowledges that, in

accordance with Article 1358 of the Civil Code, it intends to submit to the parties Anatolie Stati and Gabriel Stati a decisory oath in respect of the following facts:

"Perkwood Investment Limited and Azalia 000 were two companies controlled by Anatolie Stati and Gabriel Stati. This 'related company' status has been concealed in numerous documents including the 2007, 2008 and 2009 annual accounts of Tristan OU Ltd, Kazpolmunay LLP and Tolkynneftegaz LLP, the 'Information Memorandum' of 8 August 2008 relating to the controlled auction for the sale of Kazpolmunay LLP and Tolkynneftegaz LLP, the draft KPMG Report and the letters of representation sent by the Stati to KPMG."

In the further alternative, it asks the Court to give it the opportunity to amend the decisory oath in disputed proceedings in order to make it admissible.

The Appellant also acknowledges a record of the filing of its criminal complaint with civil action with the investigating Magistrate-director on 27 May 2019 and the payment of the required deposit, and it therefore requests that the present exequatur proceedings be stayed by reason of the application of the principle "le criminel tient le civil en état" [criminal cases take precedence over civil].

In addition, it requests the deletion of paragraphs 2, 7 and 125 of the further submissions of NautaDutilh Avocats Luxembourg S.à.r.l. of 6 June 2019.

Finally, it seeks an order that the Respondents be ordered to pay it jointly and severally, alternatively in solidum, further in the alternative each for its own part, the amount of EUR 250,000 under Article 240 of the New Code of Civil Procedure.

The Respondents request, before any other progress is made, under Article 282 of the New Code of Civil Procedure, alternatively on any other legal basis that the Court may deem appropriate, that the documents submitted by Kazakhstan in the document instituting the present proceedings be excluded from the proceedings for lack of timely submission, and they refer to the Court's discretion with regard to the question of the validity of the notice of appeal and the admissibility of documents Nos. 108 and 109 submitted by Kazakhstan.

They conclude that Kazakhstan's application for a stay of proceedings should be rejected and that the order for enforcement of 30 August 2017 be confirmed.

They ask the Court to hold that the enforcement of the Award is not contrary to Luxembourg public policy and that the conditions set out in Article 1250 of the New Code of Civil Procedure in relation to the documents to be attached to the application for exequatur have been complied with, to confirm the validity of the arbitration agreement between Kazakhstan and the Respondents and to hold that the Award was made by a properly constituted court.

In addition, the Respondents contest the applicability of immunity from enforcement in the present application procedure for exequatur.

They conclude that the offer of evidence made by Kazakhstan in its submission of 10 May 2019 should be rejected as well as held inadmissible and further alternatively that the application for the decisory oath should be rejected.

Finally, they seek the grant of a procedural allowance of EUR 30,000 under Article 240 of the New Code of Civil Procedure and acknowledge that they reserve the right to claim reimbursement of the lawyer's fees incurred in the present case.

Following the communication of the file under Article 183 of the New Code of Civil Procedure, the Public Prosecutor's Office deferred to the Court's findings.

By letters addressed to the Court in the course of deliberations, the Appellant's agent requested that the deliberations be broken off and that the termination order be revoked in order to allow further exhibits and submissions to be made.

Balancing the various interests at stake, and in so far as the Respondents have the right to have the appeal heard within a reasonable time in accordance with Article 6 of the European Convention on Human Rights, the Court should not order that the deliberations be broken off or that the termination be revoked.

The various letters and documents which the representative of Kazakhstan has submitted during the deliberations cannot, be considered pursuant to Article 65 of the New Code of Civil Procedure.

At the hearing of oral argument, the Appellant's agent requested the revocation of the termination order on the grounds that the auditors KPMG have, as of August 21, 2019, withdrawn all the audit reports that they had prepared on behalf of the Stati-controlled companies KPM and TNG and that they intend to submit new documents constituting evidence of the fraudulent manoeuvres committed by the Stati to surprise the Award, including exequatur, and to take a position on the matter by means of additional submissions.

The Respondents objected to the revocation of the termination order on the basis that the matters put forward by the Appellant have no bearing on the monetary judgment which Kazakhstan refuses to honour and, therefore, on the present litigation.

In order to determine whether those matters constitute a serious case justifying revocation of the termination order, it is necessary to assess their relevance in the light of the arguments relating to the merits of the application for exequatur.

The Court will therefore come back to this point when examining the argument alleging breach of public policy.

REASONS FOR DECISION

As to the Respondents' request for the dismissal of exhibits

The Respondents request, as a preliminary point the rejection of the 11 documents listed in the notice of appeal of 2 November 2017 under Article 282 of the New Code of Civil Procedure, for lack of timely submission, since they were communicated to the Respondents only on 14 September 2018 by the Appellant's lawyer.

Article 282 of the New Code of Civil Procedure provides that the "judge may dismiss documents that have not been filed in due time".

While it is not disputed that the exhibits listed in the notice of appeal were first communicated almost a year after the notice of appeal was served, the fact remains that the Respondents had sufficient time between the communication of the exhibits and the closing of the proceedings to analyse and take a position on the said exhibits. Their right of defence has therefore not been prejudiced.

The Appellant's exhibits 108 and 109 (statements by Alexander Foerster and Matthew H. Kirtland), on the other hand, are not inadmissible as such, while the Respondents only criticise their relevance or probative value.

The application to reject the documents should therefore be rejected.

As to the Appellant's application under Article 1263 of the New Code of Civil Procedure

The Appellant requests the deletion from the submissions of NautaDutilh Avocats Luxembourg S.à.r.l. of 6 June 2019 of paragraphs 2 (including the report in opposing Exhibit No 64 entitled 'Journey to the heart of a dictatorship'), 7 and 125.

Adducing the report broadcast on 28 April 2019 on the Republic of Kazakhstan, which has no connection with the subject matter of the present dispute, would be highly inappropriate and defamatory.

The Appellant stresses the irrelevance of the accusations made by the opposing parties on page 9 of the summary submissions of NautaDutilh Avocats Luxembourg S.à.r.l. of 6 June 2019, paragraph 7 of which reads as follows: "*In the light of the above, it is logical that many reports do not fail to stress the importance of the corruption rampant in Kazakhstan and the functioning of its institutions, the pressures exerted on foreign investors, the difficulty of enforcing judicial decisions and the lack of independence enjoyed by the Kazakh judiciary vis-à-vis the Kazakh State"*, and it notes that paragraph 125 on page 78 of the summary submissions of NautaDutilh Avocats Luxembourg S.to r.l. of 6 June 2019, reads as follows: "*Perhaps this is a common practice in Kazakhstan, but (fortunately) it is not the case in Luxembourg and in any member country of the Council of Europe (of which Kazakhstan is not a member*)" and is deemed an attack on its honour.

As the Appellant rightly points out, it is not for the Luxembourg courts and tribunals to rule on the political and institutional organisation of the Republic of Kazakhstan, which is a sovereign State.

Insofar as the legal arguments and the reporting are directed at the political regime of Kazakhstan, they are irrelevant to the present dispute and should be excluded from the proceedings.

The legal framework

The Respondents submit that the provisions set out in articles 1224 to 1251 of the New Code of Civil Procedure are excluded by the New York Convention, which is alone applicable to the enforcement of foreign awards in Luxembourg, and that the grounds for refusal listed by the New York Convention are to be interpreted strictly.

Article 1251 of the New Code of Civil Procedure sets out the grounds for refusal of exequatur. These grounds are listed with the proviso that the judge may refuse the exequatur "*Subject to the provisions of international conventions, ..."*.

Article 1251 of the New Code of Civil Procedure is to be interpreted in this sense as meaning that, where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies, the provisions of Article 1251 do not apply and that the court takes into account only the provisions of the Convention.

The arbitral award in dispute was made in Sweden, where the New York Convention

is in force, and enforcement is pursued in Luxembourg, where the Convention is also in force.

As soon as the exequatur of a foreign arbitral award is governed by the New York Convention, the specific rules of Luxembourg law do not apply. (See in this sense: Court 26 July 2005, docket number 27789; Court 25 June 2015, docket number 42067; Court 27 April 2017, docket number 40105; Court 6 December 2018, docket number 44507).

The exequatur of the Award is therefore governed by the New York Convention, and exequatur will be refused under the conditions of that Convention and not under those provided for in Article 1251 of the New Code of Civil Procedure.

Article V, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958, approved in Luxembourg pursuant to the law of 20 May 1983, reads as follows:

Article V
1. Recognition and enforcement of the award shall be refused, upon application by the party against whom it is relied on, only if that party provides the competent authority of the country where recognition and enforcement is sought with proof positive attached:

a) that the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or that such agreement is not valid under the law to which the parties have subjected it or, failing any indication to that effect, under the law of the country where the award was made; or

b) that the party against whom the award is invoked was not given due notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case; or

c) that the award relates to a dispute not referred to in the arbitration agreement or not falling within the terms of the arbitration clause, or that the award contains decisions which go beyond the terms of the arbitration agreement or the arbitration clause; provided that, if the provisions of the award relating to matters submitted to arbitration can be separated from those relating to matters not submitted to arbitration, the former may be recognised and enforced; or

d) that the constitution of the arbitral tribunal or the arbitration proceedings were not in accordance with the agreement of the parties or, failing such agreement, that they were not in accordance with the law of the country where the arbitration took place; or

e) that the award has not yet become binding on the parties or has been set aside or stayed by a competent authority of the country in which, or under the law of which, the award was made.

2. The recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds:

a) that, under the law of that country, the subject matter of the dispute is not capable of settlement by arbitration; or

b) that the recognition or enforcement of the award would be contrary to the public policy of this country.

According to Kazakhstan, the exequatur of the arbitral Award should be refused when:

i. both the arbitral Award and its enforcement would be contrary to Luxembourg public policy, whereas since the Award was made, it has been discovered that several documents and other evidence that would have had a decisive influence on the Award have been withheld and concealed by the Stati - these documents now prove that the Award was obtained by fraud;
ii. the requirements set out in relation to the documents to be attached to the application for exequatur have not been complied with;
iii. there was no valid arbitration agreement;
iv. the arbitral Award has been made by an improperly constituted arbitral tribunal;
v. the Republic of Kazakhstan would enjoy immunity from enforcement.

In the interests of legal logic, the arguments relating to the procedure must first be analysed before examining the arguments on the merits.

- **1. As to the requirements set out in relation to the documents to be attached to the application for exequatur**

The Appellant's arguments

Kazakhstan argues that, contrary to the provisions of Article IV(1) of the New York Convention, the Stati have only produced in support of their application for exequatur a simple copy of the arbitral Award and the arbitration agreement, which would, however, not meet the requirements for its authenticity.

The Respondents' arguments

The Respondents submit that, with respect to the Award, a copy of the Award which satisfies the conditions necessary for its authenticity was indeed provided to the Court, as indicated in the list of documents inserted in the application for exequatur of 24 August 2017, namely a copy certified by the Arbitration Institute of the Stockholm Chamber of Commerce, which itself made the Award. The stamp of the arbitral institution appears on each page of the Award of 19 December 2013 and the amended Award of 17 January 2014, and in addition the signature of a representative of the Arbitration Institute of the Stockholm Chamber of Commerce appears on the first and last pages of both parts of the Award.

As regards the arbitration agreement, the obligation to produce an original would not have been applicable since the arbitration agreement applicable in the present case was not a contract - as is the case in commercial arbitration - but an investment arbitration procedure under Article 26 of the ECT dated 17 December 1994, to which Kazakhstan has been a party since 16 April 1998. The transmission of a simple copy of the ECT would therefore not violate the provisions of Article 1250 of the New Code of Civil Procedure.

Assessment

Article IV(1) of the New York Convention provides that:

“1. In order to obtain recognition and enforcement under the preceding Article, the

party seeking recognition and enforcement must provide, at the same time as the application
a) the duly authenticated original of the award or a copy of such original that satisfies the requirements of authenticity;

b) the original of the agreement referred to in Article II, or a copy thereof which satisfies the conditions required for its authenticity;

2. If the *said award or agreement is not written in an official language of the country where the award is invoked, the party seeking recognition and enforcement of the award shall produce a translation of these documents into that language*. *the translation must be certified by an official or sworn translator or by a diplomatic or consular agent."*

Within the meaning of Article 1250 of the New Code of Civil Procedure:

"The exequatur of an arbitral award made abroad shall be granted by the president of the district court, seized of the matter by means of an application.
The application shall be brought before the president of the district court within whose jurisdiction the person against whom enforcement is sought is domiciled and, if he is not domiciled, is resident. If that person has neither domicile nor residence in Luxembourg, the application shall be brought before the President of the District Court of the place where the award is to be enforced.
The applicant must elect domicile in the district of the court seized of the matter.
He shall attach to his request the original of the award and the arbitration agreement or a copy thereof which satisfies the conditions necessary for their authenticity.
For the rest, the rules applicable to the enforcement of foreign judgments made in accordance with a convention on the recognition and enforcement of such judgments shall be observed."

It follows from the list of documents in the application for exequatur of 24 August 2017, as well as from the documents submitted in the case, that the Stati had attached to the application for exequatur a copy of the Award of 19 December 2013 and of the amended Award of 17 January 2014, certified on 30 June 2017 by the Arbitration Institute of the Stockholm Chamber of Commerce, as well as a French translation of the two awards certified by a sworn translator.

They had also attached a copy in French of the ECT, which provided the basis for the arbitration.

The requirements relating to the documents to be attached to the application for exequatur have therefore been met.

- ***2.*** **As to the validity of the arbitration agreement in relation to the waiting period and Terra Raf**

The Appellant's arguments

1. The Republic of Kazakhstan objects to the recognition and enforcement of the Award in Luxembourg because of the violation of the *cooling off* period imposed by Article 26 of the Energy Charter Treaty, which would constitute both a condition underlying the jurisdiction of the arbitral Tribunal and a procedural rule inherent to the validity of the arbitration clause on which the Stati (and the arbitral Tribunal) relied. Indeed, the Stati submitted their request for arbitration on 26 July 2010, i.e. only 5 days after the end of certain contracts, and they did not notify the Republic of

Kazakhstan at any time of their intention to initiate arbitration, just as they did not try to resolve the dispute amicably.

2. The Appellant further submits that Terra Raf is not an "investor" within the meaning of the ECT since it is a company incorporated and existing under Gibraltar law. Since, according to Kazakhstan, the ECT does not apply either to Gibraltar or to companies' subject to Gibraltar law, Terra Raf could not be an "investor" within the meaning of the ECT and, since Terra Raf did not have this status, no arbitration agreement could have been concluded between Terra Raf and the Republic of Kazakhstan.

The Respondents' arguments

1. The Respondents argue that, without prejudice to the fact that the requirement of a *cooling-off* period would not be a mandatory prerequisite for recourse to arbitration under the ECT, the parties, upon request by Kazakhstan dated 18 January 2011 to which the Stati agreed on 24 January 2011, nevertheless agreed to a three-month stay of proceedings, the purpose of which was to allow the parties to reach an amicable settlement and in no way to prepare for arbitration. By accepting this stay, Kazakhstan moreover explicitly waived the right to invoke any argument on the basis of Article 26 § 1 of the ECT. Moreover, the argument based on the failure to respect the "*cooling off"* period was expressly rejected by the SVEA Court.

In addition, the Stati made repeated attempts to resolve the dispute between the parties amicably from October 2010, the date on which Kazakhstan's breach of the ECT began.

2. As regards the complaint concerning Terra Raf's lack of investor status, the Respondents reply that, since no revocation of the United Kingdom's declaration concerning Gibraltar was made, the ECT became binding on Gibraltar when it entered into force for the United Kingdom.

Furthermore, the European Union is a contracting party to the ECT so that, in accordance with Article 355(3) of the Treaty on the Functioning of the European Union, the EU Treaties would apply to European territories whose foreign affairs are taken over by a Member State, including Gibraltar.

Assessment

- *Cooling off period*

Article 26 of the ECT, on the settlement of disputes between an investor and a contracting party, provides that:

"1. *Disputes between a Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former and relating to an alleged breach of an obligation of the former Contracting Party under Part III shall, to the extent possible, be settled amicably.*

2. If such a dispute has not been settled in accordance with paragraph 1 within three months of the date on which one of the parties to the dispute has requested an amicable settlement, the investor party to the dispute may choose to submit the dispute for settlement:

a) to the judicial or administrative courts of the Contracting Party which is a party to

the dispute; or

b) in accordance with any previously agreed applicable dispute resolution procedure; or

c) in accordance with the following paragraphs of this Article.

3. (a) Subject only to sub-paragraphs (b) and (c), each Contracting Party shall give its unconditional consent to the submission of any dispute to international arbitration or conciliation procedure in accordance with the provisions of this Article.

b) (i) The Contracting Parties listed in Annex ID shall not give such unconditional consent if the investor has previously submitted the dispute in accordance with the procedures set out in paragraph (2)(a) or (b).

(H) For reasons of transparency, each Contracting Party listed in Annex ID shall communicate in writing its policies, practices and requirements in this regard to the Secretariat no later than the date of deposit of its instrument of ratification, acceptance or approval in accordance with Article 39, or the date of deposit of its instrument of accession in accordance with Article 41.

c) The Contracting Parties listed in Annex IA shall not give such unconditional consent for disputes arising in connection with the provision contained in the last sentence of Article 10 (1).
6-J"

The arbitral Tribunal, seized of the same representations from Kazakhstan as the Court is now, had retained jurisdiction on the basis that it had granted, on 22 February 2011, in agreement with the parties, a stay of proceedings in order to reach an agreement to settle the dispute and that, during that period, settlement negotiations had been commenced. In view of the clear intention of Article 26(1) and (2) of the ECT, after the failure of the discussions during the three-month period granted, no prejudice was caused to any of the parties.

The SVEA Court also rejected the same arguments of Kazakhstan seeking to set aside the Award for not being covered by a valid arbitration agreement between the parties due to the failure to respect the *cooling off* period, holding in summary after a detailed analysis that an arbitration agreement between the Stati and Kazakhstan, which conferred jurisdiction on the tribunal to examine the dispute between the parties, was concluded as a result of the investors' Request for Arbitration against Kazakhstan, which was submitted to the SCC on 26 July 2010, whether or not the conditions set out in Article 26(2) of the ECT were fulfilled at the time of the request.

Pursuant to the above-mentioned Article 26, Kazakhstan has given its unconditional consent to arbitration subject only to two exceptions which do not relate to a *cooling off* period. Indeed, according to §3, the consent of the parties is subject only to sub-paragraphs b and c. The *cooling* off period is therefore not a condition for the validity of the arbitration clause, but a mere procedural requirement, which was met when the arbitral Tribunal granted, at the request of Kazakhstan, a stay of proceedings during which the parties entered into negotiations in order to reach an agreement to settle the dispute.

- *Terra Raf's status as an investor*

The arbitral Tribunal had held that the ECT applied to Gibraltar on the grounds that

Gibraltar is part of the European Union, which is itself a party to the ECT and that, according to article 52 of the Treaty on European Union and article 355 of the Treaty on the Functioning of the European Union, Gibraltar is part of its territory.

It follows from Exhibit No 16 submitted by the Respondents (letter from Counsel for Kazakhstan dated 21 March 2016) that Kazakhstan has chosen to abandon its complaints on this point in the proceedings before the SVEA Court.

Terra Raf is a limited liability company incorporated and established in Gibraltar, a territory controlled by the United Kingdom. The United Kingdom and the European Union are both signatories to the ECT.

The Court agrees with the conclusion of the arbitral Tribunal in that it determined that the ECT applies to Gibraltar. The plea based on Terra Raf's lack of investor status must therefore be rejected.

- **3. As to the constitution of the arbitral Tribunal**

The Appellant's arguments

Kazakhstan argues that the provisions of Article V(1)(b) and (d) of the New York Convention were not complied with, as, on the one hand, it was allegedly not duly informed in a timely manner of the appointment of the arbitrators and of the manner of their appointment, respectively of the arbitration proceedings. Moreover, the constitution of the Arbitral Tribunal was not in accordance with the will of the parties, nor with the arbitration agreement, which further was never validly formed between the parties.

In particular, Kazakhstan argues that the appointment of Mr. Lebedev constituted a violation of the applicable rules since the SCC Board did not comply with its own rules as well as the arbitration agreement. Moreover, the Board did not give Kazakhstan a formal notice. This would constitute a violation of Kazakhstan's rights to appoint its own arbitrator in an international arbitration with substantial financial interest.

Since the parties did not agree on a time limit for the appointment of an arbitrator, the SCC Board should have, on the basis of Article 13(3) of the SCC Rules, determined a time limit for making such an appointment, which it did not do. Thus, by failing to expressly define a time limit, the Board would have had no right to appoint an arbitrator itself.

Furthermore, an ex *parte* decision made by the Board at the request of the Stati was contrary to the principles of fair trial.

Finally, by appointing Mr. Lebedev, the Board allegedly violated section 13(6) of the SCC Rules by failing to take into account the nature and circumstances of the case.

The Respondents' arguments

The Respondents argue that the Appellant had at least 30 days to appoint its own arbitrator. However, it did not so act and did not at any point request additional time relating to the question of the constitution of the court. Failure to comply with its obligation to appoint an arbitrator within the prescribed time limit in accordance with the applicable rules constituted a breach of the arbitration agreement by Kazakhstan which would be sanctioned, under Swedish arbitration law and the SCC Arbitration

Rules, by the loss of the right of the appellant party to appoint its arbitrator. The Institute of Arbitration would thus have been empowered to appoint Professor Lebedev.

The allegations that the Appellant was not informed in a timely manner of the appointment of the arbitrators and that the constitution of the arbitral Tribunal was not in accordance with the will of the parties and the arbitration agreement were completely unfounded, which was also upheld by the SVEA Court and the United States District Court for the District of Columbia.

Assessment

It appears from the documents of the arbitration proceedings that, on 26 July 2010, the Stati submitted their request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce. In that request, they proposed that the dispute be decided by a tribunal composed of three arbitrators, appointed their own arbitrator and proposed that the two arbitrators appointed by the parties respectively should appoint the President of the Arbitral Tribunal. They also stated that, pursuant to Article 13(3) of the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce, the SCC Institute had to appoint the arbitrators itself if Kazakhstan failed to appoint an arbitrator or if the two arbitrators appointed by the parties failed to reach agreement on the chairman.

On 5 August 2010, the SCC sent a copy of the Request for Arbitration to Kazakhstan together with the Rules adopted by the parties - which provide that Kazakhstan shall appoint its own arbitrator - and requested Kazakhstan to reply in English by 26 August 2010 at the latest. The documents were sent by courier, arrived in Kazakhstan on 9 August 2010 and were received at the Ministry of Justice two days later.

The deadline having expired without any response from Kazakhstan, the SCC sent a reminder in English on 27 August 2010, extending the deadline previously granted to 10 September 2010 and informing it that the absence of a response would not prevent the arbitration proceedings initiated by the Stati from continuing normally. Kazakhstan received this letter on 31 August 2010.

In the absence of an answer from Kazakhstan within the deadline, on 13 September 2010 the Stati requested the SCC to appoint an arbitrator on behalf of Kazakhstan pursuant to Article 13(3) of the SCC Arbitration Rules. This request was sent the same day by registered mail to Kazakhstan, which acknowledged receipt on 23 September 2010.

On 15 September 2010, the SCC appointed Professor Sergei Lebedev as co-arbitrator on behalf of Kazakhstan.

On 23 September 2010, the SCC informed the parties of the appointment, with Kazakhstan receiving the decision on September 27.

On 27 September 2010, the SCC appointed Professor Karl Heinz Boeckstiegel as Chairman of the arbitral Tribunal and notified the parties accordingly by letter dated 28 September 2010, which was received by Kazakhstan on 1 October 2010.

By letter dated 2 December 2010, Kazakhstan contested the appointment of Sergei Lebedev as arbitrator.

On 15 December 2010, the SCC rejected Kazakhstan's challenge to the case of Prof. Lebedev, having found no grounds for disqualification.

The SVEA Court also dismissed Kazakhstan's complaints regarding the appointment of the arbitrators.

Pursuant to Article 5 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules),

(1) "The Secretariat shall send a copy of the Request for Arbitration and the attached documents to the Defendant. The Secretariat shall set a time limit within which the Defendant must submit a response to the SCC Institute. The response shall contain (...) any comments as to the number of arbitrators and the seat of the arbitration and, if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Defendant.
(...)
(3) If the Defendant does not submit a response, this shall not prevent the arbitration from taking place.

Under Article 7, "*The Council may, at the request of either party or on its own initiative, extend any time limit fixed in order to enable a Party to comply with any specific direction"*.

Article 13, on the appointment of arbitrators, provides that:

"(1) The parties are free to agree on a different procedure for the appointment of the arbitral Tribunal than that provided for in this Article. In such a case, if the arbitral Tribunal has not been appointed within the period of time agreed by the parties, or, if the parties have not agreed on a period of time, within the period of time fixed by the Council, the appointment shall be made in accordance with paragraphs (2) to (6).

(2) -

(3) If the arbitral Tribunal is composed of more than one arbitrator, each party shall appoint the same number of arbitrators and the Chairman shall be appointed by the Council. In the event that a party fails to appoint the arbitrator(s) within the time limit set, the Board will make the appointment.

(....)

(6) In appointing the arbitrators, the Council shall take into account the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties."

In this case, the Appellant received on 9 August 2010 the letter from the SCC to which the request for arbitration and the arbitration rules were attached and which invited it, pursuant to section 5 of the SCC rules, to submit a response to the SCC containing comments on the seat of the arbitration and on the applicants' proposal that the chairperson be chosen by the arbitrators appointed by the parties. Since Article 5(1) of the SCC Rules of Arbitration provides that the response shall include the name of the arbitrator appointed by the Defendant, Kazakhstan was therefore clearly informed of the date on which it had to appoint an arbitrator. In the absence of a response from the Appellant, the SCC took the initiative to extend the original time limit, noting that the absence of a response would not prevent the arbitration from proceeding. Contrary to the Appellant's submission, the Board had thus set a

time limit within which Kazakhstan was to appoint its own arbitrator.

The Appellant could not have been unaware that, if an arbitrator was not appointed within the time limit set, the arbitration would continue under the SCC rules. However, it neither appointed an arbitrator nor applied for an extension of time, as it could have done if it considered the time granted to it to be insufficient, particularly in view of the usual decision-making process within its government, the language in which the documents were drafted and the complexity of the case.

The Appellant has not established that the time limit as extended by the SCC Board was unreasonably short compared to arbitration proceedings conducted pursuant to the SCC rules.

In the absence of a reply from Kazakhstan within the time limit as extended, the SCC validly appointed an arbitrator on behalf of Kazakhstan, in accordance with the above-mentioned Article 13(3).

The Appellant does not explain how the appointment of Mr. Lebedev as arbitrator would not respect the nature and circumstances of the dispute between the parties.

Since Kazakhstan had been duly informed of the arbitration proceedings and of its obligation to appoint an arbitrator, had been given an opportunity to present its case and since the constitution of the arbitral Tribunal took place in accordance with the terms of the arbitration agreement and the rules of the Arbitration Institute referred to therein, the provisions of article V(1) (b) and (d) of the New York Convention were complied with.

- **4. As for immunity from enforcement**

The Appellant's arguments

The Appellant further requests the revocation, if not the reversal, of the exequatur order of 30 August 2017 on the grounds that it was issued in disregard of the immunity from enforcement enjoyed by the Republic of Kazakhstan and that its purpose is to protect the property of a sovereign State from the enforcement measures of its creditors and for which it is presumed that it is used for government purposes.

It notes that the Stati carried out a garnishment procedure without presidential authorisation on 16 August 2017 under Article 695 of the New Code of Civil Procedure, on the basis of the arbitration Award and that, in the context of this procedure, the Stati announced that the exequatur procedure for the latter was under way, so that the exequatur would thus have become part of the enforcement procedure itself implemented by the Stati.

The Respondents' arguments

According to the Respondents, the appellant cannot invoke immunity from enforcement in the present exequatur proceedings.

It would appear from Article 26 of the ECT and Article 40 of the Rules of Arbitration of the Institute of Arbitration that the appellant party, by having ratified the ECT and thereby undertaking to enforce all arbitral awards made under the ECT, has waived all immunity from enforcement.

In the alternative, in the unlikely event that the Court seized of the matter were to allow the application for immunity from enforcement to the Republic of Kazakhstan, this should be taken into account not at the stage of the exequatur procedure, but in the context of an enforcement procedure, i.e. in the context of the garnishment procedure.

Appreciation

The foreign State which has submitted itself to the arbitral tribunal has thereby accepted that the Award may be given an exequatur, which does not in itself constitute an act of enforcement such as to give rise to immunity from execution of the State in question. (Court of Cassation, Civil Division 1, 11 June 1991, Appeal No. 90-11282, published in the Bulletin).

Exequatur is not, in itself, an act of enforcement capable of excluding the immunity of an international organization from execution (Court of Cassation, Civil Division 1, 14 October 2009, Appeal No. 08-14.978, published in the Bulletin).

The claim of immunity from execution is therefore dismissed.

- **5. As for breach of public policy**

The Appellant's arguments

Kazakhstan contends that the Award was obtained by fraud, as the Stati voluntarily made false statements, produced false evidence and concealed fundamental factual elements from their own experts, Kazakhstan and the arbitral tribunal, thereby improperly and fraudulently obtaining the Award which they seek to have enforced by the Luxembourg courts.

In the context of their alleged investment in Kazakhstan, the Stati allegedly set up various fraudulent schemes prior to the arbitration procedure, aimed in particular at artificially inflating the construction costs of the LPG Plant in Kazakhstan in order to mislead third parties as to the true value of the LPG Plant and to claim considerable amounts without any basis. The third parties that have been misled include (i) their own auditor, KPMG, (ii) the investors who financed the Stati's activities in Kazakhstan (the Noteholders and their joint venture partner, Vitol, which financed the construction of the LPG Plant); potential buyers in the context of the sale of the Stati's assets in Kazakhstan organised in 2008 (the “Zenith Project”); and the Kazakh tax and customs authorities.

To this end, the Respondents would have, inter alia:

- set up or had set up various companies which they presented as third-party companies but which they controlled in a covert manner (in particular Perkwood - in the UK - and Azalia - a company incorporated under Russian law);
- Made misrepresentations to their auditors about the control and status of these companies in relation to the Stati;
- concealed the true status or even existence of these two companies in a series of documents including (i) the consolidated financial statements of Tristan, KPM and TNG, (ii) the representation letters addressed by the Stati to their own auditor, KPMG, (iii) the *due diligence* report prepared in the context of the Zenith Project and intended for potential buyers, (iv) the *Information Memorandum* prepared in the context of the Zenith Project and

intended for potential buyers and (v) the customs declarations addressed to the Kazakh customs authorities;

- artificially inflated by several tens of millions of dollars the alleged investment costs of the construction of the LPG Plant (tripling of the price of equipment, double resale of the same equipment, fictitious accounting of construction equipment, services and transport services, fictitious management fees and charges, interest relating to loans allegedly intended to finance the construction costs of the LPG Plant, etc.);
- prepared false financial statements of, among others, Tristan, KPM and TNG presenting companies related to Stati as third parties and containing fraudulently and artificially inflated amounts;
- prepared a truncated *due diligence* report for potential clients
  In the context of the Zenith Project, deliberately misrepresented the status of several companies related to the Stati as third and independent parties, thereby concealing inter-company transactions that had been artificially and fraudulently inflated; and
- prepared a deliberately manipulated Information Memorandum intended for potential purchasers in the Zenith Project, itself also containing artificially and fraudulently inflated construction costs of the LPG Plant for the benefit of other companies controlled by the Stati.

The Stati then allegedly deliberately misled the arbitral Tribunal by submitting these documents (KPMG *due diligence* report on the Zenith Project, TNG's annual accounts for the years 2006 to 2009, "*Information Memorandum")* which they knew to be false and manipulated, in order to reveal allegedly significantly inflated investment costs and to claim an amount of damages considerably higher than the costs incurred by the Stati for the construction of the LPG Plant.

The arbitral Tribunal concluded that the LPG Plant should be valued at USD 199 million by reference to the indicative Offer made by KMG for the purchase of the LPG Plant. In holding that this source was the best source relatively for the assessment, the Tribunal necessarily indicated that it would have taken other sources into account in its analysis, so that its decision would also have been influenced by the other elements relied on by the Stati concerning the construction costs.

Kazakhstan argues that it is for the Luxembourg court to ascertain whether the recognition and enforcement of the Award is such as to prejudice Luxembourg public policy, which, within the meaning of the New York Convention, is understood to mean international public policy (see Court 28 January 1999, P. 31, 95; Court 26 July 2005, P. 33, 117)

Luxembourg case-law and doctrine defines international public policy as anything that affects the essential rights of the administration of justice or the implementation of contractual obligations, or even anything that is considered essential to the established moral, political and economic order.

Moreover, the Luxembourg Court of Appeal, in a more recent judgment, held that there would be a violation of Luxembourg international public policy "*when the award or its enforcement is unacceptably contrary to the legal order of the requested State in that it infringes a fundamental principle"* (Court of Appeal, 17 October 2013, docket no. 37973). It could be a "*manifest violation of a rule of law considered essential in the legal order of Luxembourg"* or a "*violation of a fundamental right of this legal order"* (Court of Appeal, 15 July 2015, docket no. 40127).

In order to assess the conformity of an arbitral award with international public policy,

the judge should conduct a legal and factual examination of the award without however rehearing the case on the merits.

The doctrine and jurisprudence of today would unanimously allow that fraud constitutes a violation of international public policy.

Under the New York Convention, the enforceability of an arbitral award should be refused on the basis of the violation of public policy "if the *prevailing party has adduced false evidence before the court or if the award was obtained by fraud (…) - such fraud vitiates the entire arbitral proceedings and constitutes a defence against the recognition of the resulting award."* Fraud would be a ground for refusal of exequatur in cases of "*deliberate deception concerning facts material to the arbitrator's decision"*, including "the *use of false or fabricated documents" or "false testimony"*. (G. BORN, International Commercial Arbitration, 26th ed., Kluwer Law International, 2014, pp. 3704-3706).

The possibility of punishing fraud through the public policy exception under the New York Convention was allowed by the Court of Appeal in the above-mentioned judgment of 15 July 2015.

In application of the "*fraus omnia corrumpit"* principle, the conclusion is to be drawn from a judgment of the Luxembourg Court of Appeal of 24 November 1993 (docket no. 14983) that fraud should allow the sanctioning of an award that has given effect to deception or fraudulent conduct (J.-B. Racine, "L'arbitrage commercial international et l'ordre public" [International commercial arbitration and public policy], LGDJ, no. 893).

Although the text of the New York Convention itself would not provide descriptions of situations where there is a violation of public policy, there would nevertheless be a broad international consensus that fraud in arbitration proceedings constitutes an independent basis for establishing a violation of public policy. The Appellant refers in particular to English, German, French and American case law.

Referring to the above-mentioned decisions and doctrine, Kazakhstan argues that the fraudulent arrangements put in place by the Stati would constitute a violation of public order. Thus, the Stati (i) intentionally concealed relevant information during the arbitration proceedings, (ii) deliberately made false statements and (iii) led the Arbitral Tribunal to rely on documents, created on the basis of artificial data, of which the Stati were well aware, and in particular:

- they claimed, on a recurring basis, to have spent at least USD 245 million on the development and construction of the LPG Plant when in fact this amount was artificially inflated through transactions between related entities for which no basis exists;
- they deliberately hid the existence of these transactions and intentionally concealed the fact that these transactions were concluded with related entities (in particular Perkwood and Azalia);
- they allegedly stated before the arbitral Tribunal that KMG's offer was reliable as an indicator of the value of the LPG Plant (claiming that this offer had been made by a party with full knowledge of the relevant data), even though they were aware that this offer was based on fictitious elements presented to KMG;
- they failed to pay the Perkwood contract and the Azalia contract to the arbitral Tribunal when they were required to do so pursuant to the procedural order;
- they withheld vital information and made false statements about the Laren transaction.

In its submissions, the Appellant exhaustively details the frauds alleged against the Stati (redemption fraud, management fee fraud, fictitious documents fraud, construction equipment fraud, interest fraud, fraud relating to the Laren Transaction, etc.).

Kazakhstan reiterates inconsistencies between the positions defended by the Stati before the Court of Appeal on the one hand and in foreign proceedings on the other, concerning the concealment of the status of Perkwood, manipulation of the construction costs of the LPG plant through fraud over the purchase of the equipment, inaccurate statements concerning *transfer pricing,* management fee fraud and fraud using fictitious documents, which would show that the Stati are trying to seek a final decision from the Court on facts which they know to be incorrect.

The frauds by the Stati directly affect the entire arbitration proceedings and the Award, namely, the jurisdiction of the Arbitral Tribunal, the findings of the Arbitral Tribunal on the liability of Kazakhstan and the quantum of damages and interest payable by Kazakhstan.

With respect to the influence of fraud on the jurisdiction of the arbitral Tribunal, the Appellant argues that fraud that taints an investment prevents the investor from accessing the arbitration since:

i. the protection of foreign investment which the host State agrees to grant by treaty cannot be considered as granted when the investment is made in bad faith and is tainted by fraud;

ii. access to investor-host State arbitration is based on a pre-established agreement of the host State (enshrined in the Treaty); however, the State cannot be considered to have given its consent to arbitrate a dispute where the investment is tainted by fraud;
iii. no state in the world would agree to grant such exorbitant protection under ordinary law, and such a fettering of its sovereignty, to a fraudulent investor and investment that violates the law.

The Stati's fraudulent behaviour contaminated their entire alleged investment in Kazakhstan and would therefore prevent them from benefiting from the international protection provided by the ECT, and more specifically from access to investor-state arbitration. The arbitral Tribunal therefore had no jurisdiction to judge the dispute submitted to it by the Stati.

In any event, because of the concealment of the facts withheld by the Stati and the false documents produced by the Stati, this debate could not have taken place before the arbitral Tribunal, which would constitute a flagrant violation of Kazakhstan's right to a fair hearing and a fair trial.

With regard to the influence of fraud on Kazakhstan's liability, the Appellant submits that during the arbitration proceedings the Stati produced a series of false documents and made false statements which influenced the arbitral Tribunal's decision on Kazakhstan's liability and, in particular, that it found a causal link between Kazakhstan's actions and the damage suffered by the Stati, in particular following the conclusion of the Laren transaction.

Finally, with regard to the influence of fraud on the quantum of damages and interest, the Appellant points out that during the arbitration proceedings, the Stati produced a whole series of false documents and made false statements which influenced the

decision of the Arbitral Tribunal regarding the quantum of damages finally awarded to the Stati, in particular for the LPG Plant and for the Laren transaction.

The Appellant further contends that it was only after the Award had been made and the exequatur proceedings commenced in the United States and the United Kingdom that it discovered that the Award had been obtained by fraud; the fraud relating to the Laren transaction was only discovered after the decisions of the Swedish courts.

The evidence, including the testimony of the witness Lungu, is set out in detail in the appellant's submissions.

In the alternative, Kazakhstan offers to prove the establishment of the fraudulent system by the hearing of witnesses, alternatively by decisory oath.

The Respondents' arguments

The Respondents argue that, since the grounds for refusal of exequatur are exhaustively enumerated by the New York Convention, the discovery of new evidence subsequent to the arbitral Award or the fact that the award was obtained by fraud would not in themselves be grounds for refusing to grant exequatur of the arbitral Award in Luxembourg.

A court seized of an application for recognition and enforcement under that Convention would not be entitled to examine the arbitral award on the merits. Therefore, an alleged violation would only be sanctioned if the mere reading of the award reveals that violation.

It would not be for the court seized to make an assessment as to the compatibility of the foreign award with the public policy of its country, but only to check whether the recognition and enforcement of the award is such as to undermine that public policy (a principle widely accepted by Luxembourg case law and doctrine, known as the “effet atténué de l'ordre public”) [mitigated effect of public policy].

Luxembourg case law would take a restrictive approach to the possibility of refusing enforcement of an arbitral award on the ground of violation of public policy, it being specified that this is international public policy.

The role of the Court seized of the matter should therefore be limited to verifying whether the enforcement of the Award in Luxembourg could offend international public policy as applied in Luxembourg, including everything relating to the essential rights of the administration of justice or the implementation of contractual obligations, or even everything considered essential to the moral, political or economic order established there.

Account should also be taken of the origin of the Award, which was made in Sweden, a member country of the European Union.

Under both the New York Convention and the Luxembourg Arbitration law, the Court's assessment would be limited when:

- the “favor arbitrandum” principle implies that the exequatur of an arbitral award is the rule and the refusal of exequatur the exception, so that only in serious cases or extreme situations can a Luxembourg court refuse the exequatur of an arbitral award on the grounds of alleged fraud and violation of international public policy;

- the court ruling on a refusal of enforceability may in no case re-examine the merits of the arbitral award and is bound by the res judicata authority of the latter;
- a violation of international public policy, like any other ground for refusal, must be interpreted restrictively;
- the rules on the burden of proof rest with the party seeking the refusal of exequatur, in this case Kazakhstan.

In the present case, there have been no violation of the most fundamental principles of Luxembourg's moral, political or economic order in accepting an arbitral award, where Kazakhstan merely criticises the quantum of compensation obtained by the Stati, especially since the connection between the case in question and Luxembourg is particularly tenuous, further restricting the scope of international public policy.

Furthermore, the Court would be bound to respect the res judicata authority of the SVEA Court's decision.

A debate on the merits of the case and the alleged fraud would run counter to (i) the fundamental principles governing exequatur and (ii) the Swedish decisions, violating the res judicata authority attached to them.

According to the Respondents, the fraud alleged by the Appellant, assuming it to be real, would not qualify as a breach of public policy.

Primarily, they argue that Kazakhstan can no longer rely on alleged fraud.

On the one hand, the Award, being final and binding between the parties, has the authority of res judicata.

The fraud argument had already been raised by Kazakhstan in the proceedings to set aside and had been definitively swept aside by the SVEA Court, which decided that there had been no fraud and that an alleged fraud had in any event had no influence - either direct or indirect - on the Award. The Swedish Supreme Court rejected Kazakhstan's extraordinary application to re-open proceedings. Final and binding Swedish judgments rejecting the appeal for setting aside of the Award would be recognised in Luxembourg under the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and have the force of res judicata.

The res judicata authority of the SVEA Court's decision would be binding in the present proceedings in relation to what the SVEA Court has decided on fraud, thus precisely preventing the Court from re-examining fraud as a ground for refusing exequatur.

In any event, a decision of a court of the seat rejecting the setting aside of an arbitral award would be considered a strong argument in favour of the recognition and enforcement of an award abroad.

On the other hand, Kazakhstan should have relied on the alleged fraud during the arbitration proceedings, since, according to the Respondents, it would have been aware of all the facts underlying its allegations of fraud before and during the arbitration.

Finally, the Stati argue that there has been no fraud on their part and that Kazakhstan does not in any case provide proof of this.

They contest the facts as presented by Kazakhstan and argue, inter alia, that, contrary to Kazakhstan's allegation, they were not guilty of "fraudulent manoeuvring", and more specifically:

- they would never have sought to conceal the Perkwood company or the Perkwood contract, of which Kazakhstan was in any event fully aware before and during the arbitration proceedings;
- they did not purchase equipment for the LPG Plant from Perkwood at fictitious and artificially inflated prices - such prices being based on obvious economic logic - and it would be inaccurate to claim that “the same equipment had already been supplied, at a much lower price, by TGE under the contract concluded with the latter”, such a claim disregarding the respective roles of Perkwood and TGE in the supply of equipment for the LPG Plant; they would not have made a “double resale” of the same equipment, as the equipment was never delivered and the payment would have been refunded in any case;
- they would not have “fictitiously” recorded equipment for the construction of the LPG Plant;
- they would not have made fictitious purchases of equipment from Perkwood, as this equipment had been delivered and was needed at the LPG Plant;
- they would not have “created from scratch” management fees and expenses, as these are legitimate, contractually provided for and subject to Kazakh tax;
- they would not have fictitiously inflated the costs with fictitious interest;
- they would not have kept, in a “covert” or fictitious way, double bookkeeping;
- they would not have manufactured or produced false documents during the arbitration;
- it would not be relevant in the context of these proceedings to know whether or not the Stati had “dormant accounts” with Company House in the United Kingdom;
- they would not have “deliberately misled the arbitral Tribunal” with respect to the Indicative Offer; the arbitral Tribunal having based itself on this offer, which had been seriously formulated, prior to the dispute, by KMG (a company wholly owned by Kazakhstan);
- they would not have committed fraud in connection with the financing of their investment.

In their submissions, the Respondents elaborate on the various points in question.

The Respondents further request the rejection of the investigative measures requested by Kazakhstan.

In the alternative, the Respondents argue that the alleged fraud, even if proven, would not have been the decisive factor in the arbitral Award.

The alleged fraud would only concern an indicative offer made by a third party and would cover a very small aspect of the investors' Kazakh assets, and this before the dispute arose between the parties. Moreover, the allegations of fraud would only concern part of the quantum of Kazakhstan's judgment: a major part of the judgment would not be affected by these allegations at all.

The link between the alleged elements of fraud and the Award would be non-existent and there would be no “determinative causation”. The Swedish courts, after an in-depth analysis of the Award after three years of intensive proceedings to set aside have ruled in a final, binding and non-appealable manner that any fraud had no direct or indirect influence on the arbitral Award.

The connection that Kazakhstan would seek to create in a totally artificial way between an alleged fraud and the Award would in no way constitute decisive causation. The alleged fraud only concerned an indicative offer issued by a third party and the Stati never argued that the arbitral Tribunal should rely on KMG's Indicative Offer.

The existence of an alleged fraud had a possible impact only on the quantum of Kazakhstan's judgment and would have changed absolutely nothing in the arbitral Tribunal's finding that Kazakhstan had breached its obligations under the ECT.

The alleged fraud relied on by Kazakhstan is in fact only a criticism of the method of evaluation applied by the arbitrators for one of the three items of damages awarded to the Stati. Thus, a possible fraud could have had a possible impact on only a fraction of the amount of Kazakhstan's judgment.

The concept of public policy in the context of exequatur

Article V(2)(b) [of the New York Convention] permits a court in which recognition or enforcement of an award is sought to refuse recognition or enforcement if it were contrary to the public policy of that country. However, Article V(2) (b) does not define public policy. Nor does it specify whether it is the principles of public policy of the State of the court seized or principles based on the concept of international public policy that are to be applied in an application for recognition and enforcement under the New York Convention. The concept of international public policy is generally narrower than the concept of national public policy. Most state courts have adopted a narrower test for defining international public policy, based on standards from international sources. The International Law Association's 2002 recommendations on public policy are increasingly seen as reflecting best practice at the international level. The International Law Association notes first of all that “the international effectiveness of awards made in international commercial arbitration must be ensured, save in the presence of exceptional circumstances” (Article 1(a) of the General Provisions) and that such exceptional circumstances may consist “of the fact that the recognition or enforcement of the international arbitral award would be contrary to international public policy” (Article 1(b) of the General Provisions). Article 1 (c) of the General Provisions specifies that the expression “international public policy” may refer to the set of principles and rules adopted by a State which, by their nature, may frustrate the recognition or enforcement of an arbitral award made in an international commercial arbitration, where recognition or enforcement of that award would result in their violation, either by reason of the procedure at the end of which the award was made (procedural international public policy) or by reason of the content of the award (substantive international public policy). Article 1(d) of the General Provisions states that the international public policy of a State includes: (i) the basic principles relating to justice and morality which the State wishes to protect, even if it is not directly involved; (ii) the rules intended to serve the state’s political, social or economic interests, known as “public order law” or “public policy law”; and (iii) the duty of the state to comply with its obligations towards other states or international organisations. (International Council for Commercial Arbitration Guide to the Interpretation of the New York Convention, Chap. III, V.2. p. 115 et seq.).

Article V(2)(b) of the New York Convention allows the courts of a Contracting State to refuse recognition and enforcement of an award if they find that such recognition or enforcement would be contrary to the public policy of that State.

Since the concept of public policy is not defined by this Convention, it is for the courts of the Contracting States to define it.

While public policy is defined differently from State to State, case law tends to rely on the ground of public policy to refuse recognition and enforcement of an award under Article V(2)(b) in cases where the fundamental values of a legal system have been derogated from. Invoking the public policy exception represents a safety valve that can be used in exceptional circumstances where it would be impossible for a legal system to recognise and enforce an award without denying the very basis on which it is based. (UNCITRAL Secretariat Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 2016 edition, pp. 252 et seq.)

Most courts give the concept of public policy a narrow interpretation.

The same guide refers to the definition of public policy given by the United States Court of Appeals, Second Circuit, according to which "[l][execution of foreign arbitral awards may be refused [on the basis of public policy] only where such execution in the country of the forum is likely to prejudice the most fundamental values of morality and justice of the forum State".

The French courts have adopted a similar approach. The Paris Court of Appeal, for example, has defined international public policy as "the set of rules and values which the French legal order cannot allow to be disregarded, even in situations of an international nature".

The German courts have held that an award infringed public policy when it disregarded a norm governing the foundations of German public and economic life or was irremediably opposed to the German concept of justice.

The Court of Appeal for England and Wales held that the public policy exception in the New York Convention was intended to cover cases where "the enforcement of an award would clearly be contrary to the public interest or the enforcement might seriously offend the ordinary, reasonable and well-informed citizen on whose behalf the authority of the State is exercised". (ibid.)

The public policy exception allows the courts of the Contracting State where recognition and enforcement is sought to examine the award on the merits in order to satisfy themselves that nothing in the award infringes the fundamental values of that State.

Even if the public policy exception allows national courts to review the award on the merits, the scope of this review is not unlimited. Public policy does not provide the party opposing recognition and enforcement with an opportunity to present its case on the merits afresh or to rely on the erroneous nature of the decision.

The burden of proof lies with the party opposing recognition or enforcement.

The exceptional nature of the public policy argument explains why a higher standard of proof is in principle required by the courts to refuse recognition and enforcement under Article V(2)(b).

While the enforcing courts accept in principle that recognition of an award should be refused on grounds of public policy in particular cases, such as corruption or fraud, in most cases the parties claiming that the award is contrary to public policy fail to substantiate their allegations.

Various jurisdictions have required parties alleging fraud to produce clear and

convincing evidence to that effect, to demonstrate that the fraud in question could not be discovered during the arbitration and that it had a material connection with an issue before the arbitration. In other words, in cases of fraud or bias, where the public policy exception under the New York Convention is relied on, the courts often require proof of an additional factual element, namely that the default relied on was of such a nature as to have affected the outcome of the arbitration.

This higher level of proof is consistent with the exceptional nature of the public policy argument, but also with the fact that Article V(2)(b) furnishes national courts with a mere discretion, without providing for any obligation. Although these courts may proceed to review an award on the basis of infringement of public policy , the fact that they place the burden of proof on the party opposing recognition and enforcement, as well as the higher standard of proof required, reflects the existence of an international consensus on the pro-enforcement approach of the New York Convention and the caution that should be exercised in resorting to the public policy exception (ibid.)

Luxembourg law holds that Article V [of the New York Convention] allows the refusal of exequatur in the case (...) where enforcement (but not the award itself) would be contrary to public policy. It is not for the court seized to assess the compatibility of the foreign award with the public policy of its country, but only to verify whether the recognition and enforcement of the award is likely to undermine that public policy, the well-known principle of “l'effet atténué de l'ordre public” [“the mitigating effect of public policy”]. For the purposes of the Convention, the public policy of the State where the arbitral award is relied on is therefore not the internal public policy of that country, but its international public policy, which is defined as everything relating to the essential rights of the administration of justice or the implementation of contractual obligations, or even everything considered essential to the established moral, political or economic order and which, for that reason alone, must necessarily exclude the application of an award incompatible with the internal public policy of the State where it is invoked. In order to be refused exequatur, an award must violate, in concrete effect at the point when the court becomes seized, its fundamental principles of the law applicable to international relations. An award based on a contract to which the consent of one of the parties was obtained as a result of fraudulent manoeuvres by the other could not be declared effective in the legal order of the exequatur court. However, the New York Convention does not provide for any review of the manner in which arbitrators decide on the merits, subject only to respect for international public policy. Even a gross error of fact or of law, even if committed by the arbitral tribunal, is not a ground for refusing exequatur for the award. This is certainly the case with the complaint that the arbitrators misjudged, or did not take into consideration at all, some of the documents submitted to them. (J.C. Wiwinius, Le droit international privé au Grand-Duché de Luxembourg, [Private International Law in the Grand Duchy of Luxembourg] 3rd ed, §1919).

According to Gilles Cuniberti, in the context of the review of arbitral awards, Luxembourg case law enshrines a restrictive notion of public policy.

It is thus established, and case law never fails to note, that arbitral awards cannot be reviewed on the merits, in law or in fact (see, for example, Court 26 July 2005, docket No. 27789; Court 15 July 2015, docket No. 40127). It follows that, however gross, the arbitrator's error, in law as well as in fact, it is not a case of the review of awards, and therefore cannot lead to a refusal of exequatur.

Moving away from a case-by-case approach with which the French Court of Cassation is fully familiar, Luxembourg case law has for some years now been

proposing a positive definition of public policy with regard to which it intends to review arbitral awards. The Court of Appeal ruled that there would be a violation of Luxembourg public policy "where the award or its enforcement would unacceptably offend the legal order of the requested State in that it would infringe a fundamental principle" (Court, 17 October 2013, docket no. 37973; Court, 15 July 2015, docket no. 40127). It added that it could be a "manifest infringement of a rule of law regarded as essential in the Luxembourg legal order" or "an infringement of a fundamental right of that legal order" (Court, 15 July 2015, docket No 40127).

(...)

This definition reflects the restrictive nature of the public policy exception, and rightly emphasises the rules which alone can legitimately constitute international public policy. On the one hand, it is about fundamental rights. Reference is made here to rights recognised as fundamental either in domestic law (Constitution) or in European or international law (European Convention on Human Rights, in particular). It also concerns, on the other hand, rules and principles which, without necessarily having been elevated to the rank of fundamental rights, constitute essential rules or fundamental principles of the Luxembourg legal order. (G. Cuniberti: Le contrôle des sentences arbitrales au regard de l'ordre public en droit luxembourgeois, Journal des tribunaux Luxembourg 2016/3) [Review of arbitral awards in view of public policy in Luxembourg Law, Journal des tribunaux, Luxembourg 2016/3]

In a judgment of 28 January 1999 (Pas. 1999-2001/1, pp. 95-103), the Court of Appeal held that "*By the New York Convention of 10 June 1958, Luxembourg undertook to recognize arbitration agreements and may only refuse exequatur of arbitral awards made pursuant to arbitration agreements on the grounds listed exhaustively in article V of the Convention*. *In order for the exequatur court to be able to refuse [an application] for one of these reasons, the party against whom enforcement is sought must first have provided proof of the existence of this reason (Article V, 1). Therefore, the applicant does not have to provide any evidence. A refusal by the court can only follow if the award is contrary to public policy or if the court finds that the subject matter of the dispute was not, according to its law, capable of being submitted to arbitration (Article V, 2). The review by the court addressed must focus, first, on whether the disputed awards were made following a procedure sufficiently protective of the rights of the defence and, second, whether the law applied to the merits of the awards is compatible with its international public policy. Additional grounds for refusal of recognition and enforcement which would lead either to a re-examination of the merits of the case or to the establishment of the grounds for invalidity referred to in Article 1023 of the Code of Civil Procedure may not be resurrected in the guise of public policy. Since the aim is to give effect in Luxembourg to rights acquired abroad, public policy is only involved in its mitigated effect and is less stringent than if the same rights were acquired in Luxembourg. The Convention does not in any case allow the court seized of the application for exequatur to review the manner in which the arbitrators decide on the merits, subject only to respect for international public policy. Even a gross error of fact or law is not a ground for refusing to enforce the award."*

In a judgment of 26 July 2005 (Pas. 33, 117) the Court noted that "*By the New York Convention of 10 June 1958, Luxembourg undertook to recognise arbitration agreements and may refuse exequatur of arbitral awards made pursuant to arbitration agreements only on the grounds enumerated exhaustively in Article V of the Convention*. *The grounds for refusal, which must be relied on by the party opposing recognition or enforcement, are, in addition to those relating to the setting aside or stay of the award in the State of origin (para. 1.(e) the invalidity of the*

arbitration agreement (para. 1.(a) breach of the adversarial process (para. 1.(b) exceeding the terms of the arbitration agreement (para. 1.(c) Any irregularity affecting the composition of the arbitral tribunal or the arbitral proceedings as agreed (para. 1.(d), to which should be added those which may even be raised ex officio and which are the non-arbitrability of the dispute (para. 2a) and the award's incompatibility with international public policy (para. 2.b).

As to whether the foreign arbitral award is contrary to international public policy, the review by the court addressed must essentially focus first on the question whether the award in dispute was made following a procedure sufficiently protective of the rights of the defence and secondly, whether the law applied to the merits of the award is compatible with its international public policy, although because of the overall convergence of the laws of the two Contracting States, there is *little risk that Belgian law as applied by the arbitrator might conflict with the principles of public policy of the court addressed*. *In any event, the idea of resurrecting, in the guise of public policy, additional grounds for refusal of recognition and enforcement, which would ultimately lead to a re-examination of the merits of the case, or to establishment of the grounds for nullity referred to in Article 1244 of the New Code of Civil Procedure, must in any event be rejected. Since the aim is to give effect in Luxembourg to rights acquired abroad, public policy is therefore only involved in its mitigated effect and is less stringent than if it were a question of acquiring the same rights in Luxembourg. The New York Convention in no way allows the court hearing the application for enforcement to review the manner in which the arbitrators decided on the merits, subject only to public policy. Even a gross error of fact or law, even if committed by the arbitral tribunal, is not a ground for refusal of exequatur."*

Exclusion of enforcement by recourse to public policy is justified only if a fundamental principle of the legal order of the State addressed is infringed by the violation of an essential rule of law or a fundamental right in the legal order of that State. (Court of Justice, 17 October 2013, docket number 37973).

The public policy clause in Article V(2) (b) of the New York Convention does not permit a review of the merits of the arbitral award and can only be applied if the award or its enforcement would unacceptably conflict with the legal order of the requested State in that it would affect a fundamental principle. The enforcement of a judgment or arbitral award which, according to the arguments of the party opposing it, was obtained by fraud, without such fraud being the result of a decision of the competent court or panel of arbitrators, does not constitute a manifest infringement of a rule of law considered essential in the legal order of Luxembourg and does not undermine a fundamental right of that legal order. (Court 15 July 2015, docket number 40127)

Appreciation

Taking account of the above arguments, the Court holds that, in order for there to be an infringement of public policy, the Award must have been obtained by manifest and decisive fraud.

The burden of proof lies with the party opposing the exequatur on the ground of fraud.

The allegations made by the Appellant, even assuming them to have been established, and the fact that KPMG withdrew its reports on the financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not such as to constitute fraud tainting the very basis of the respondents' investment in Kazakhstan, which began long before the manoeuvres criticised by the Appellant. They are therefore not such as to affect the jurisdiction of the Arbitral Tribunal.

Under the terms of the Award (§1095), the arbitral Tribunal found that Kazakhstan's measures, taken in context with each other and compared to the treatment of the Stati investments prior to the Order of the President of the Republic of 14/16 October 2008, constituted a series of harassment measures coordinated by numerous institutions in Kazakhstan. These measures are to be regarded as a breach of the obligation to treat investors in a fair and equitable manner in accordance with Art. 10(1) ECT.

The Tribunal fixed the quantum of damages at a total of USD 508,130.00, of which USD 277,800,000.00 were for the Borankol and Tolkyn fields, USD 31,330,000.00 were for the properties of Contract 302 and USD 199,000,000.00 for the LPG Plant, and deducted three liabilities.

The Laren liability was not deducted from the damages and interest awarded by the Tribunal, which held that it was caused by the conduct of Kazakhstan - which the Tribunal found to be a violation of the ECT - and was repaid.

The Award itself, in that it declares an award of a sum of money, is not contrary to public policy.

In the light of the detailed statement of reasons which led the Tribunal to hold Kazakhstan liable, the Appellant has not established that the alleged fraud would have influenced the decision concerning its liability.

As regards the Laren transaction, the Award (§§ 1415 and 1416) states that "*The Parties agree, as does the Tribunal, that the Applicants were only able to weather the storm of summer 2009 by obtaining financing through the Laren loan.. The Parties agree with the Tribunal that the terms of the Laren loan were disastrous for the Applicants. In addition, the Parties agree with 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 Plaintiffs to take out the Laren loan. The Tribunal finds that the Laren loan, with its onerous terms, was contracted in June 2009, as 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.*

As a result, contrary to the Appellant's allegations, the arbitrators had taken into account that TNG and KPM were experiencing financial difficulties at the end of 2008, even before the alleged actions in Kazakhstan.

The principle of the liability of Kazakhstan and the principle of compensation of the Stati are therefore not called into question by the fraud alleged by the appellant, which concerns, at most, part of the quantum of damages.

In assessing the quantum of the damage relating to the LPG Plant, the arbitral tribunal held that it did not have to evaluate the respective experts' reports and the very different conclusions they reached, but that the contemporaneous offers made for the LPG Plant by third parties after the Stati's efforts to sell the LPG Plant, both before and after 14 October 2008, represented the best source of assessment for the valuation date accepted by the Tribunal.

It stated that "*Prospective purchasers have made an offer for the plant, not as salvage value, but for potential operation*. *This is reflected in the uncontested indicative bids submitted by interested buyers in 2008, which estimated the LPG plant at USD 150 million on average.*

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 plant. 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 plant during the relevant period of the valuation date accepted by the Tribunal. Therefore, this is the amount of damages and interest that the court accepts in this context." (§§1746 and 1747).

In its application to set aside the Award before the SVEA Court, Kazakhstan had put forward arguments of fraud which, for the most part, are the same as with those currently relied on.

The SVEA Court summarised Kazakhstan's arguments in these terms:

"Firstly, the construction of an LPG plant has been wrapped up in a vast and sophisticated fraudulent arrangement, which constitutes an act of corruption on the part of the Investors. The purpose of the structure was to create significant fictitious value for the LPG plant through false contracts and transactions. Second, the Investors engaged in procedural fraud by presenting false evidence in the form of witness statements, testimony and expert opinions regarding the fraudulent arrangement and thus the value of the LPG plant, which misled Kazakhstan, the SCC and the arbitral tribunal. The Investors also deliberately withheld information regarding the investment and valuation of the LPG plant in order to hide the fraudulent arrangement from Kazakhstan, the SCC and the arbitral tribunal. Thirdly, the misleading approach of the Investors influenced the outcome of the case as it served as a basis for the indicative offer of KazMunaiGas National Company (KMG) and thus for the calculation of damages by the arbitral tribunal. In addition, the false evidence affected the overall assessment of witness testimony, witness statements, expert reports and the actions of Investors in general, which affected both the issue of liability and the assessment of the amount of damages.

(...)
The arbitral tribunal's assessment of the value of the LPG plant, and hence the damages and interest awarded to the Investors, was based on the indicative offer, so the fraudulent and misleading arrangement of the Investors directly influenced the outcome of the case."

The SVEA Court dismissed these arguments by holding that:

"As the Court described above, 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 were submitted when it is not clear that they were directly determinative of the result (...).

(...) There should be no question, in the view of the Court, of allowing such indirect influence on the arbitral tribunal as to allow the award to be held invalid other than where it is clear that such indirect influence had a decisive impact on the outcome of the case.

Since the tribunal based its decision on the indicative offer, the evidence relied on by the Investors in the form of oral testimony, witness statements and expert reports concerning the amount of the investment cost - evidence that Kazakhstan had declared false - did not have a direct impact on the result. This circumstance alone means that such evidence in itself, even if it proves to be false, cannot, in the Court's view, constitute sufficient grounds for holding the award invalid. Nor is it obvious, in the Court's view, that this evidence, through its indirect influence on the tribunal, was of decisive importance for the outcome of the case.

As to the question whether the indicative offer in itself constituted false evidence, it is not disputed that KMG, before the arbitration was initiated, had submitted an offer of $199 million for the LPG plant. The indicative offer in itself should therefore not be considered as false evidence, even if potentially 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 allegedly false information in the annual reports is therefore not directly related to the tribunal's decision on the value of the LPG plant. In this respect, the reference made by the Investors to the indicative offer did not constitute relying on false evidence.

Finally, as regards Kazakhstan's assertion that, in the arbitration, the Investors concealed from the tribunal and from Kazakhstan certain information that could have influenced the outcome of the case, the Court observes that a party in a case that is susceptible to out-of-court settlement such as arbitration cannot be required to provide the opposing party with information prejudicial to its own case. The award cannot be held invalid for this reason, particularly in the light of the very narrow scope of the rule of public policy."

The SVEA Court concluded that Kazakhstan's assertions regarding the fraudulent arrangement, false evidence and misleading information presented during the arbitration do not constitute grounds for setting aside the Award in accordance with the provisions of the Swedish arbitration law.

The Supreme Court of Sweden rejected Kazakhstan's appeal against this decision.

Contrary to the arguments made by the Respondents, the decisions of the Swedish courts seized of the application to set aside the Award and examining the validity of the Award by reference to Swedish public policy do not prevent the Court of Appeal, seized of an application for exequatur , from assessing, in the light of the arguments of fraud put forward, whether the Award was contrary to international public policy.

The review exercised by the exequatur court, which is exclusive of any power to review the merits of the arbitral decision, is, however, limited and has the sole purpose of verifying whether the recognition or enforcement of the Award effectively and concretely violates international public policy.

The Court cannot, under the guise of the argument alleging breach of public policy by reason of fraud in the arbitral award, re-examine the merits of the case in the light of the evidence adduced by the Appellant.

Fraud in the arbitral award involves the production of false documents, the taking of false testimony or the fraudulent concealment of documents relevant to the resolution of the dispute from the arbitrators, so that the arbitrators' decision was ambushed.

A party opposing exequatur on the ground that the arbitral award is contrary to public

policy must not only establish the alleged fraud by clear and convincing evidence and show that the fraud in question could not have been discovered during the arbitration, but also that the “fraudulent manoeuvres” had an influence on the arbitrators' decision.

In this case, the alleged fraud is not the result of the decision of the arbitral Tribunal, nor of the decision of the SVEA Court or the Supreme Court of Sweden, nor of a decision of a criminal court nor of a court of another State.

In so far as the fraud must be manifest, it is not for the Court, when seized of an application for exequatur, to take measures of investigation to establish the existence of the alleged fraud.

Both the Appellant's offer of evidence by witnesses and his offer of the decisory oath should therefore be rejected.

Even if it had been established, the alleged fraud would have had no influence on the arbitrators' decision as to the liability of Kazakhstan, but would have affected only part of the damages at issue, in this case the damages relating to the LPG Plant.

The arbitral Tribunal, which had at its disposal numerous documents, expert opinions and testimonies, decided to base its assessment of the damages and interest relating to the LPG Plant on KMG's indicative offer, which was not specifically relied on by the Stati in support of their claim. However, the arbitrators were free to choose the elements they deemed relevant for the assessment of the LPG Plant and they had the opportunity to check the accuracy and to assess the relevance of the documents and information submitted to them.

Likewise, the parties had the opportunity to check/have checked and discuss all the documents on file during the arbitration proceedings and to bring their own documents, expert opinions and testimonies, so that the procedure was sufficiently protective of the rights of the defence.

KMG's indicative offer on which the arbitrators essentially relied to assess the damage relating to the LPG Plant is not a false document as such, but it was actually made by KMG - a third party in relation to the Stati - well before the start of the arbitration proceedings.

Both the fraud arguments previously alleged before the SVEA Court and the few new elements of evidence relied on before the Court seized of the matter, as well as the new element currently relied on in relation to the KPMG letter, are aimed at establishing that KMG's indicative offer is based on false elements and could therefore not be used by the arbitrators to assess the damages for the LPG Plant.

However, on the one hand, the Plant's costs - which, according to the Appellant, were artificially inflated by the Respondents - were only one element among others taken into consideration by KMG in preparing the offer.

On the other hand, the arbitrators must have known that, being only an indicative offer, it could in no way reflect the exact value of the Plant. They thus considered that “*the prospective purchasers have made an offer for the plant, not as salvage value, but for potential operation”*.

With respect to the Laren transaction, the Appellant has neither established, in light of the Respondents' submissions, the fraud by clear, cogent and convincing evidence nor that it could not have discovered the alleged fraud at the time of the arbitration or, in any event, before the decision of the SVEA Court.

Nor does the appellant adduce evidence that the Award was made on the basis of false statements and documents, nor of an obvious fraudulent scheme by the Stati to obtain this decision.

Allegations of fraud against the Stati, even if established, are thus irrelevant to the Award.

The fact that most of the arguments relating to fraud currently put forward have been dismissed by the Swedish courts and that both Sweden and Luxembourg are members of the European Union further reinforces the Court's view that the enforcement of the Award does not constitute an unacceptable breach of Luxembourg's public policy.

In the light of the foregoing arguments, it has not been established that the arbitral Award and the Corrective Award or their enforcement constitute a manifest violation of a rule of law considered essential in the legal order of Luxembourg and infringe a fundamental right of that legal order.

The argument based on breach of public policy within the meaning of Article V(2)(b) of the New York Convention must therefore be rejected.

It follows that there is no reason to revoke the termination order since the fact that KPMG has withdrawn all the audit reports it has prepared on behalf of KPM and TNG is irrelevant and does not constitute a serious case within the meaning of Article 225 of the New Code of Civil Procedure.

-* As for the stay of proceedings

The Appellant's arguments

Kazakhstan is requesting, on the basis of article 3 of the Code of Criminal Procedure, a stay of proceedings because of the complaint with a civil suit that it lodged with the investigating Magistrate against the Stati on 27 May 2019, for the following reasons:

- forgery and use of forgeries, respectively attempted forgery and use of forgeries;
- judgement fraud, respectively attempted judgement fraud;
- [money] laundering, respectively attempted [money] laundering.

The attempt to enforce the award obtained by fraud by the Luxembourg courts would constitute an extension of the offence on the territory of the Grand Duchy of Luxembourg, so that criminal jurisdiction would exist in Luxembourg.

There would be between the two actions, criminal and civil, unity of parties, object and cause of action, and the public action would clearly have an impact on the civil action in several respects.

In the context of the proceedings in Luxembourg, the Stati allegedly produced a whole series of false documents, in particular the false KPMG "*due diligence"* report during the Zenith Project relating to the sale of TNG and the LPG Plant, the false

annual accounts of TNG (and since 2007 the false combined financial statements of Tristan, KPM and TNG) for the years 2006-2009 and the false *Information Memorandum* used during the Zenith Project relating to the attempted sale of TNG in 2008.

If the criminal courts were to decide that the documents submitted by the Stati in the arbitration procedure and in the exequatur procedure are forgeries, this would clearly prevent the recognition and enforcement of the arbitral Award in Luxembourg.

The Respondents' arguments

The Respondents take the view that the interests of the proper administration of justice would require that this delaying tactic be disregarded in order to continue the exequatur proceedings to its conclusion.

The exequatur judge would not be the civil action judge within the meaning of article 3 of the Code of Criminal Procedure.

Kazakhstan's application to the Court did not seek compensation for any potential damage caused by a criminal offence.

The complaint filed on 27 May 2019 by Kazakhstan could not have any impact on the procedure for the exequatur of the arbitral Award and there would be no risk of conflicting decisions.

The complaint amounts to a delaying tactic.

Appreciation

As part of its criminal complaint, Kazakhstan claims, inter alia, that several documents produced by the Stati in the arbitration are forged, including in particular the financial statements of Tristan, KPM and TNG, *the Information Memorandum* and the KPMG *Due Diligence Report*. The Stati allegedly submitted false evidence knowingly to the arbitral Tribunal with the aim of deliberately misleading the arbitrators in order to obtain an award against Kazakhstan. The documents and information concealed by the Stati would have had a decisive influence on the Sentence. The arbitral Tribunal would never have granted the Stati's claims if it had been aware of their criminal and delinquent conduct at the time. The actions of the Stati would fall under criminal law. The Stati allegedly knowingly and fraudulently misled the arbitral Tribunal regarding the costs of the construction of the LPG Plant in order to have Kazakhstan ordered to pay them damages and interest for losses never actually suffered. These damages were calculated on the basis of fictitious costs and investments, alternatively intentionally inflated for fraudulent purposes. They had also been documented by fictitious contracts and false documents, as well as by expert reports constituting similarly false opinions, to the extent that the latter had been written on the basis of those same false documents and fictitious contracts. The Award was therefore the product of the offences of fraud, forgery and use of forgeries and its use by the Stati in the context of the exequatur procedure constituted fraudulent manoeuvres within the meaning of Article 496 of the Criminal Code. The use of the Award by the Stati in the context of garnishment procedures constituted the offence of money laundering.

The application of the rule laid down in article 3, paragraph 2, of the Code of Criminal Procedure, which is intended to prevent the civil judge from contradicting the decision to intervene in the public action over which authority may prevail, is subject to two

conditions: 1. that the action arises out of the same fact which serves as the basis for the public action and, 2. that the public action was actually instituted before or during the continuation of the civil action, the latter condition being fulfilled in the present case.

With regard to the condition of the unity of fact giving rise to the two actions, while it is not necessary for both to have the same cause and subject, there must nevertheless be a common issue which the civil court cannot decide without at the same time establishing the offence committed and thus running the risk of putting itself in contradiction with the criminal court. (Court of Justice, 24 November 1993, No 14983 in the register).

In the present case, Kazakhstan alleges the same facts found on the criminal complaint as those alleged as fraudulent manoeuvres by the Stati to oppose the application for exequatur.

If it is accepted that the exequatur judge is a civil judge within the meaning of article 3 of the Code of Criminal Procedure, the application for a stay of proceedings may be granted only if the facts cited as constituting the offence have a direct bearing on the ground for refusing exequatur and the criminal decision to intervene is likely to influence the civil decision.

However, it has been held above that the alleged fraud and, therefore, the facts cited as constituting the offence do not have a direct impact on the exequatur.

There is, therefore, no reason to stay the proceedings.

As for procedural allowances

In view of the outcome of its appeal, Kazakhstan's claim for procedural compensation is to be dismissed;

If the Respondent parties fail to justify the lack of fairness required by Article 240 of the New Code of Civil Procedure, then there is no need to grant them procedural compensation.

FOR THESE REASONS:

the Court of Appeal, Eighth Chamber, sitting in civil and exequatur matters, ruling after full argument on the report of the pre-trial Judge:

a) dismisses the application for revocation of the termination order,

b) declares the appeal admissible,

c) strikes from the proceedings' paragraphs 2, 7 paragraph 1 and 125 paragraph 5 of the Respondents' Summary Submissions, as well as their Exhibit No. 64,

and dismissing all other claims, submissions, arguments and offers of evidence, declares that the appeal shall fail,

and further declares the respective claims of the parties made on the basis of Article 240 of the New Code of Civil Procedure invalid, ordering the appellant to disburse costs.

This judgment was read at the public sitting outlined above by Lotty PRUSSEN, President of the Chamber, in the presence of the Registrar, Alain BERNARD.