

[informal translation from Dutch]

26 September 2017 Amsterdam Court of Appeal

Court fees charge current account NautaDutilh N.V. quoting case number 50107248

Application to enforce foreign arbitral award pursuant to Article 1075 DCCP in conjunction with Articles III and IV of the New York Convention (1958), alternatively pursuant to Article 1076 in conjunction with Articles 985-991 DCCP

Applicants,

Mr Anatolie Stati, residing in Chisinau, Moldavia

Mr Gabriel Stati, residing in Chisinau, Moldavia

the company under foreign law Ascom Group S.A. ("Ascom Group"), with its registered office in Chisinau, Moldavia

the company under foreign law Terra Raf Trans Trading Ltd. ("Terra Raf"), with its registered office in Gibraltar

hereinafter jointly "Stati et al."

electing domicile in this case in Amsterdam at Beethovenstraat 400 (1082 PR), being the office address of NautaDutilh N.V., lawyers, civil-law notaries and tax consultants, where lawyers responsible for the case are Mr G.J. Meijer and Ms M. van de Hel - Koedoot, the former of whom has signed and submits this application:

apply for recognition and leave to enforce a foreign arbitral award on the following grounds.

This application is directed at:

1. the REPUBLIC OF KAZAKHSTAN, hereinafter "Kazakhstan", which is understood to include:

the REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),

with its seat at, inter alia, the following addresses:

Ministry of Foreign Affairs 31 Kunayev Street 010000 Astana (Kazakhstan)

Ministry of Finance
11 Pobeda Ave
010000 Astana (Kazakhstan)

Ministry of Justice, House of Ministries
8 Mangilik El Street 010000 Astana
(Kazakhstan)

2. the company under foreign law SAMRUK-KAZYNA JSC, with its registered office in BC “Emerald Towers”, Block B, 8 Kunayev Street, Astana, Kazakhstan.¹

¹ See for Samruk-Kazyna JSC Appendix 8 (more in particular paragraphs 65-76 of the application, included in the appendix, to levy pre-judgment attachment pursuant to Articles 700 et seq DCCP).

Introduction

1. Kazakhstan has natural mineral fuel reserves in the form of oil and gas and has in the past expressed a wish to attract investors for the exploitation of these minerals. For that reason, Kazakhstan ratified the Energy Charter Treaty ("Energy Charter").
2. Between 1999 and 2003, Anatolie Stati and his son Gabriel Stati – through the Ascom Group and Terra Raf companies – acquired shares in two Kazakhstan companies: Kazpolmunay LLP ("KPM ") and Tolkyneftegaz LLP ("TNG"). KPM owned the exploitation rights for the Borankoil oilfield. TNG had similar exploitation rights for the Tolkyn oilfield and the Tabyl Block.
3. After Stati et al. had invested substantial sums in making the oilfield profitable, Kazakhstan started a campaign of slander and intimidation against Stati et al. so that it could acquire Stati et al.'s investments at rock bottom prices. When the plan misfired, Kazakhstan simply appropriated the Stati et al. investments.
4. These actions by Kazakhstan prompted Stati et al. to start arbitration proceedings. The basis for the claim was violation of obligations upon Kazakhstan under the Energy Charter. In the arbitration proceedings, Stati et al. claimed compensation in the amount of USD 2.5 billion.
5. On the basis of Article 26 (3)(a) of the Energy Charter, Kazakhstan, as a Contracting Party, gave its unconditional consent to the submission of a dispute with an Investor to international arbitration.² In accordance with Article 26 (4)(c) of the Energy Charter, Stati et al. (as Investor) gave their written consent to the submission of the dispute to arbitration by lodging a Request for Arbitration on 26 July 2010 with the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC").³ The consent given by Kazakhstan pursuant to Article 26 (3) of the energy Charter, together with the written consent given by Stati et al. on the basis of Article 26 (4) of the Energy Charter constitute the arbitration agreement between the parties.
6. On 19 December 2013, the tribunal gave an arbitral award (the "Arbitral Award "), as supplemented on 17 January 2014 (the "Supplementary Arbitral Award").

² The Energy Charter came into force for Kazakhstan on 16 April 1998. The exceptions of Article 26 (3)(b) and (c) do not apply in this case.

³ In paragraph 94 of the Request for Arbitration (Appendix 7).

In the Arbitral Award, the tribunal dismissed certain jurisdiction defences raised by Kazakhstan and held that Kazakhstan had violated its obligation, as laid down in Article 10 (1) of the Energy Charter Treaty, to treat investors "fairly and equitably":⁴

"Taking into account the above considerations, the Tribunal concludes that [Kazakhstan] 's measures, seen cumulatively in context to each other and compared with the treatment of [Stati c.s.]' investments before the Order of the President of the Republic on 14/16 October 2008, constituted a string of measures of coordinated harassment by various institutions of [Kazakhstan]. These measures must be considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. W(1) ECT." [Underlining added]

7. The tribunal also ruled that Kazakhstan's conduct had caused damage to Stati et al. and that Kazakhstan was liable for this damage.

In the Arbitral Award, the tribunal ordered Kazakhstan to pay the following amounts:⁵

"1. The Respondent has violated its obligations under the Energy Charter Treaty with respect to Claimants' investments.

2. Subtracting the subtotal of debts (USD 10,444,899.00) from the subtotal of compensation due (USD 508,130,000.00), the Tribunal decides that Respondent shall pay to claimant a net amount of USD 497.685.101.

3. This net amount is to be paid from Respondent to Claimants with interest, defined as the rate of 6 months US Treasury Bills from 30 April 2009 to the date of payment, compounded semi-annually.

4. Regarding the costs of arbitration, the Tribunal decides:

4.1 Of the costs of arbitration as determined by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Respondent shall bear 3/4 and Claimants 1/4. These arbitration costs will be drawn from the advances paid by the Parties to the SCC.

4.2 Further, Respondent shall pay to Claimants 50% of Claimants costs of legal representation, i.e. an amount of USD

⁴ Arbitral Award, paragraph 1095.
Arbitral Award, page 414.

8,975,496.40.

5. All other claims are dismissed." [Emphasis added]

8. In the Supplementary Arbitral Award, the tribunal then, in conformity with the Swedish Arbitration Act, specified the costs of arbitration, which it fixed at EUR 1,069,470.98. On the basis of part 4.1 of the operative part of the Arbitral Award shown above, Kazakhstan was ordered to pay three quarters of that amount to Stati et al., i.e. EUR 802,103.24.
9. The Arbitral Award and the Supplementary Arbitral Award are not open to appeal.
10. Following the Arbitral Award, Kazakhstan instituted proceedings to have the Arbitral Award and the Supplementary Arbitral Award set aside before the competent court in Stockholm, Sweden (the "Svea Court of Appeal"), in which proceedings Kazakhstan claimed that the Arbitral Award and the Supplementary Arbitral Award should be set aside in full or in part.
11. Stati et al. disputed the Kazakhstan claims extensively in the proceedings before the Svea Court of Appeal. In a judgment on 9 December 2016 (the "Swedish Court Judgment"), the Svea Court of Appeal dismissed the claim to set aside the Arbitral Award and the Supplementary Arbitral Award in full. The judge also ruled that Kazakhstan must compensate Stati et al. for legal costs and ruled that Kazakhstan must pay the following amounts:⁶
 - i) SEK 4,614,358 and USD 377,400.65 to Ascom Group;
 - ii) SEK 4,114,357 and USD 377,400.65 to A. Stati;
 - iii) SEK 4,114,357 and USD 377,400.65 to G. Stati;
 - iv) SEK 4,114,357 and USD 377,400.65 to Terra Raf;
 - v) interest on the above amounts at the rate of interest according to Article 6 of the Swedish Interest Act 1975:635 with effect from 9 December 2016 until the date of payment in full.
12. Finally, and in accordance with Article 43 (2) of the Swedish Arbitration Act, the Svea Court of Appeal ruled that the Swedish Court Judgment was not open to appeal.

⁶ See page 2 of the Swedish Court Judgment.

⁷ Stati et al. hereby submit in evidence the Swedish Court Judgment together with an English translation as Appendix 1 and Appendix 2.

Appendix 1 the Swedish Court Judgment

Appendix 2 English translation of the Swedish Court Judgment.

13. However, notwithstanding this judgment from the Svea Court of Appeal, Kazakhstan pursued an extraordinary legal remedy before the Swedish Supreme Court seeking to set aside the Swedish Court Judgment on the basis of a 'grave procedural error' allegedly made by the Svea Court of Appeal. A ruling is not expected in those proceedings within the foreseeable future.
14. Naturally, the pursuance of an extraordinary legal remedy is just yet another attempt by Kazakhstan to frustrate the rights of Stati et al. However, the pursuit of the aforesaid extraordinary legal remedy may not under Swedish and Dutch law lead to the deferral or refusal of the application for recognition and enforcement of an arbitral award. Nor does it affect or suspend the effect and/or validity of the Arbitral Award and the Supplementary Arbitral Award. Stati et al. also referred in this respect to the recent decision of the Court of The Hague, ground 4.1, in the matter of Carpatsky Petroleum Corporation v PJSC Ukrnafta (Exhibit 3), which involved precisely the same type of extraordinary legal remedy:

"The cassation appeal instituted by Ukrnafta does not change the foregoing. The decision of the Swedish Supreme Court does not relate to the question of whether the judgment of the Court of Appeal of 26 March 2015, in which the Ukrnafta claim seeking to have the arbitral award set aside was dismissed, can be upheld and therefore does not deny the effect of the arbitral award. By contrast to what Ukrnafta has argued, the question of whether the cassation appeal has any prospect of success is therefore not relevant for the moment in this case."
15. Proceedings seeking the recognition and enforcement of the Arbitral Award and the Supplementary Arbitral Award are currently pending before the High Court of Justice in London, Great Britain and the (federal) US District Court for the District of Columbia, United States. Kazakhstan is opposing recognition and enforcement in both proceedings.
16. Proceedings are also pending before the US District Court for the Southern District of New York, for the recognition of the Swedish Court Judgment as what is known as a 'foreign money judgment'.

⁷ Swedish Court Judgment, page 66.

17. As at the date of this application, Kazakhstan has failed to perform its obligations under the Arbitral Award, the Supplementary Arbitral Award and the Swedish Court Judgment. Furthermore, in light of Kazakhstan's attitude during the arbitration and the subsequent period, Stati et al. have sufficient reason to assume that Kazakhstan will not comply with its obligations voluntarily.

Application for recognition and leave to enforce the Arbitral Award and the Supplementary Arbitral Award.

18. The place of arbitration was Stockholm, Sweden, and therefore the Arbitral Award and the Supplementary Arbitral Award are foreign arbitral awards. Title 2 of Book 4 DCCP therefore applies to the recognition and enforcement of the Arbitral Award and the Supplementary Arbitral Award.
19. Given that Sweden is party to the New York Convention (1958) application for leave to enforce can be made under the aforesaid Convention (Article III), in conjunction with Article 1075 DCCP, which is Stati et al.'s principal request. Alternatively, Stati et al. seek leave to enforce the Arbitral Award and the Supplementary Arbitral Award pursuant to Article 1076 DCCP, in conjunction with Articles 985-991 DCCP.
20. In mind of the provisions of Article IV of the New York Convention (1958), Stati et al. hereby submit the following documents in evidence:

Appendix 4 An authenticated copy of the Arbitral Award

Appendix 5 An authenticated copy of the Supplementary Arbitral Award

Appendix 6 The English text of the Energy Charter, together with the Dutch translation of the Energy Charter
Appendix 7 The Stati et al. Request for Arbitration⁸

Jurisdiction of the Amsterdam Court of Appeal

21. Stati et al. wish to recover the Arbitral Award and the Supplementary Arbitral Award from the assets of Kazakhstan in the Netherlands. The majority of Kazakhstan's assets are in Amsterdam.

⁸ The consent given by Kazakhstan pursuant to Article 26 (3) of the Energy Charter, together with the written consent given by Stati et al. by submission of the Request for Arbitration on the basis of Article 26 (4) of the Energy Charter constitute the arbitration agreement between the parties (see paragraph 5 above).

Under Article 985, ultimate sentence, in conjunction with Article 1075 DCCP (or Article 1076 DCCP), the Amsterdam Court of Appeal is therefore competent to hear and decide upon this application.⁹ To the extent that Kazakhstan does not have (or no longer has) assets in Amsterdam, this does not affect the competence of the Amsterdam Court of Appeal.¹⁰

22. On the basis of the foregoing, Stati et al. have a right to and an interest in obtaining recognition and leave to enforce the Arbitral Award and the Supplementary Arbitral Award

FOR WHICH REASONS

Stati et al. respectfully request that the Court of Appeal:

- recognise and declare the enforceability of the arbitral awards of 19 December 2013 and 17 January 2014;
- order Kazakhstan to pay costs, on the enforceable matters.

Amsterdam, 26 September 2017-----

G.J. Meijer

This case is being handled by Mr G.J. Meijer, NautaDutilh N.V., Beethovenstraat 400 (1082 PR), Amsterdam, T +31 20 71 71 772, F +31 20 71 71 111, E Gerard.Meijer@nautadntilh.com . File number: 50107248.

⁹ See also The Hague Court of Appeal, 20 December 2016, ECLI:NL:GHDHA:2016:3781.
¹⁰ See Supreme Court, 17 April 2015, NJ 2015, 453.