ROME COURT OF APPEAL

WRIT OF SUMMONS

OPPOSING THE RECOGNITION OF A FOREIGN AWARD

PURSUANT TO ARTICLE 840 OF THE CODE OF CIVIL PROCEDURE

AND APPLICATION FOR THE SUSPENSION AND/OR ANNULMENT

OF THE PROVISIONAL ENFORCEABILITY OF THE DECREE

***EX* ARTICLE 839 OF THE CODE**

ON BEHALF OF

THE REPUBLIC OF KAZAKHSTAN (also referred to as "RoK"), represented by Mr Sergey Nurtayev, born in Almaty, Kazakhstan on 6 November 1974, tax reference NRTSGY74S06Z255W, plenipotentiary Ambassador and legal representative of the Republic of Kazakhstan in the Republic of Italy, represented and defended jointly and severally by virtue of the power of attorney attached hereto, by the Attorneys Avv. Daniele Geronzi, tax reference GRNDNL74E26H501X, certified email *danielegeronzi@ordineavvocatiroma.org*, and Avv. Cecilia Carrara, tax reference CRRCCL75P59H501P, certified email *ceciliacarrara@ordineavvocatiroma.org*, with elected domicile at Legance – Avvocati Associati, Via di San Nicola da Tolentino n. 67, Rome, who declare they wish to receive notices and communications at these email addresses or fax 06-931827403.

claimant

Mr ANATOLIE STATI, a Moldovan and Romanian citizen, born on 25 October 1952, resident at 20 Dragomirna St, Chisinau, MD-2008, Moldova, state identification number 0961610889327

Mr GABRIELE STATI, a Moldovan and Romanian citizen, born on 30 September 1976, resident at 1A Ghioceilor St, Chisinau, MD-2008, Moldova, state identification number 0951807890164

ASCOM GROUP S.A., a company established under Moldovan law, domiciled at 75 A. Mateevici St, Chisinau, MD-2009, Moldova, registered as a company on 25 March 1994, registration number 1002600006034, in the person of its *pro tempore* legal representative ("ASCOM")

TERRA RAF TRANS TRADING LTD., a company incorporated under the law of Gibraltar, with registered office at 13/1 Line Wall Road, Gibraltar, entered in the United Kingdom registered of Companies for the Overseas Territory of Gibraltar on 1 March 1999, registration number 68069, in the person of its *pro tempore* legal representative ("TERRA RAF")

all represented and defended in the proceedings pursuant to Article 839 of the code of civil procedure by the Attorneys Avvocati Michelangelo Cicogna, Silvia Doria, Chiara Caliandro, Prof. Raffaella Muroni, and Andrew Garnett Paton, who have elected domicile at their offices at Via Vincenzo Bellini, n. 24, Rome

respondents

in the opposition proceedings under Article 840 of the code of civil procedure against *ex parte* decree No. 1287/2018 rendered by the President of Civil Section No. 1 of the Rome Court of Appeal on 29-30 January 2018 (docket No. 8412/2017), by which (i) the foreign award issued on 19 December 2013 in case

No. 116/2010 before the Arbitration Institute of Stockholm Chamber of Commerce (the "**Award**") and (ii) the Addendum of 17 January 2014 (the "**Addendum**"), have been recognised in Italy.

* * *

I - BACKGROUND

1.1 By means of Presidential Decree, number 1287/2018 of 29-30 January 2018 (the "**Judgment**"), the Court of Appeal upheld the respondents' application under Article 839 of the code of civil procedure that the Award and Addendum be recognised and declared enforceable in Italy.

1.2 Although relevant departments of RoK are still verifying the exact date on which it was served with the application and the Judgment – beside the well known internal organization of government ministerial departments, these events corresponded with a holiday period in Kazakhstan – notice was probably not effected before April 26, 2018; therefore, the 30-day period pursuant to Article 840 of the code of civil procedure for the commencement of opposition proceedings – 30-day period during which a Judgment pursuant to Article 839 of the code is not enforceable and hence enforcement proceedings cannot legally be started[1] – would therefore have expired on or after 28 May 2018 (doc. 1).

1.3 Pending such date, the claimant became aware that some third parties in Italy, including State Street Global Advisors Limited, received attachment

[1] In scholars, see AULETTA, *L'efficacia in Italia dei lodi stranieri*, in AA.VV., *Diritto dell'arbitrato*, edited by G. VERDE, Naples, 2005, 561; CAMPEIS-DE PAULI, *Il processo civile italiano e lo straniero*, Milan, 1996, 383; CICCONI, *Lodi stranieri (riconoscimento ed esecuzione)*, Turin, 1997, 318; CONSOLO, *Sulla provvisoria esecutorietà del lodo straniero tra art. 8409 c.p.c. e Convenzione di New York*, in *Corr. Giur.*, 1997, 709 ff., 712; PUNZI, *Disegno sistematico dell'arbitrato*, 2nd edn., 759 ff.

orders on May 3, 2018, basis on the circumstance that they allegedly held sums due to RoK[2].

1.4 As a mere precaution (considering that, as said above, the deadline for the opposition will not expire until at least 28 May) we hereby submit an opposition pursuant to Article 840 of the code of civil procedure, within the 10-day time limit from the date in which the first enforcement action may have been taken, notwithstanding that this would be unlawful, lacking a valid enforceable title.

While, in any case, reserving the right to supplement this opposition by the applicable deadline.

* * *

II. THE OPPOSITION

2.1 This proceedings concerns an opposition to the recognition and enforcement in Italy of an arbitral award rendered in breach of the principles of legality and substantive justice, which also apply outside of Italian law and represent matters of internal public policy. In such respect, during the English proceedings aimed at obtaining recognition of the award in the United Kingdom, the English High Court has already held that there is sufficient prima facie evidence that the Award was obtained by fraud (see section 5 below).

It seems therefore useful to explain, since now, that RoK, while seeking to establish the reasons whereby the Award cannot be recognised in Italy pursuant

[2] Partly in consideration of cases already brought before the Courts of other jurisdictions, we wish to point out that this opposition is submitted without prejudice to any other opposition in relation to the fact that National Bank of Kazakhstan and its contracting parties and counterparties, such as State Street, are separate legal entities to RoK and are not liable for any sums payable by RoK to third parties, including the Statis.

to Article 840 of the code of civil procedure, has already invested time and huge financial resources on ensuring that the award be not implemented in various European jurisdictions and in the United States, because it emerged **following** the arbitration that the **Award was rendered on the basis of false evidence and testimonies** by the respondents, **as part of a larger fraudulent scheme against RoK**.

2.2 In this opposition, therefore

(i) we will summarize the key facts of the case, the relationships between the parties up to the arbitration procedure (see section 3 below), and the circumstances, discovered after the conclusion of the arbitration, which revealed the fraudulent scheme of respondents (see section 4 below)

(ii) we will provide certain information in relation to the proceedings brought in other jurisdictions concerning the recognition and/or annulment of the Award (see section 5 below)

(iii) we will explains the reasons why the Award and the Addendum cannot be recognised in Italy, namely

a. the Award contains provisions that clearly violate the internal public policy (see paragraph 6.1 below)

b. the Arbitral Tribunal did not have jurisdiction lacking a valid arbitration clause (see 6.2 below)

c. The Arbitral Tribunal was not constituted in accordance with the agreement between the parties (see paragraph 6.3 below)

(iv) finally, we will explain the serious grounds for the enforceability of the Award be suspended under Article 649 of the code of civil procedure, since it was erroneously granted by this Court (see paragraph 7 below).

* * *

III. FACTS OF THE CASE, AND INFORMATION RELATING TO THE ARBITRATION PROCEEDINGS

3.1 ***Subjects involved***

RoK is a democratic state entity which maintains international relations with Italy and the European Union, which moreover is the RoK's leading investor and trading partner[3].

RoK is also a party to numerous multilateral treaties, and on June 28, 2016 was elected by the General Assembly of United Nations as a non-permanent member of the UN Security Council for the Asia-Pacific region from 2017 to 2019.

RoK is moreover a signatory of the Energy Charter Treaty, a form of very close cooperation in the energy sector, intended mainly to protect investments and provide binding dispute resolution procedures (doc. 2). In particular, the treaty (i) provides the obligation for contracting States to apply non-discriminatory conditions in governing energy products trading, and to protect foreign investments and ensure that they are treated in the same way as domestic ones, and (ii) lays down specific methods for resolving disputes between contracting States, and between contracting States and investors.

Even though RoK has been successful in nearly all of the legal proceedings brought against it and concerning investments in the territory of Kazakhstan, as its Minister of Justice pointed out (doc. 3), it has also generally complied quickly with judgements and arbitration awards rendered against it. The Award in favour of the respondents is therefore an **exceptional and isolated case**, (and was

[3] It signed a new and closer cooperation and partnership agreement with the European Union in December 2015.

defined as such in the English High Court's recent judgement, see section 5 below); as previously stated, claimant's opposition mainly is grounded on the respondents' fraudulent scheme and their breach of basic principles of substantive and procedural legality.

ASCOM, a Moldovan joint-stock corporation, and TERRA RAF, a limited company domiciled in Gibraltar, are two companies directly and/or indirectly related to Anatolie and Gabriel Stati, who are Moldovan and Rumanian citizens (see Award, paragraph 207, respondents' document 2-*bis*).

3.2 ***Relationships between the parties***

In the early 2000s, the respondents acquired interests in Kazakh companies exploring, developing and exploiting gas and petroleum deposits in eastern Kazakhstan. Specifically, in 1999, (i) ASCOM acquired a majority shareholding, which it then increased, in Kazpolmunai ("KPM"), which operated in the development of a field at the Borankol site (see Award, paragraphs 212 and 223, respondents' document 2-*bis*). In 2000, (ii) ASCOM acquired the 100% shareholding in Tolkynneftgas ("TNG"), which operated in the development of the Tolkyn field; the shareholding was then transferred to TERRA RAF (see Award, paragraphs 226, 235, and 239, respondents' document 2-*bis*)

In 2006, the oil trading company Vitol FSU BV ("Vitol") signed a joint venture agreement ("JOA Agreement") with ASCOM, TNG, and TERRA RAF whereby (a) ASCOM and Vitol would finance the construction of a liquefied petroleum gas plant ("LPG Plant"), each providing capital of USD 20 million, and (b) TERRA RAF would bear the residual costs (see Award, paragraph 250, respondents' document 2-*bis*).

The respondents continued their business activities until the end of 2008, when the President of Moldova informed the President of Kazakhstan of the illegal nature of the activities that Anatolie Statis was carrying out using income earned from investments in Kazakhstan (see Award, respondents' document 2-*bis*). The Kazakh authorities could not ignore this information, and thus duly started to investigate on Statis' business activities and those of the companies controlled by them. They thus found a whole series of major irregularities and violations of national tax, regulatory and environmental laws, which however did not relate to the circumstances which were discovered only after the arbitration and which revealed the fraudulent scheme (see Award, paragraphs 920-940, respondents' document 2-*bis*).

As a result of the serious violations which have been found, on July 21, 2010, the relevant Kazakh authorities terminated their subsoil contracts with TNG and KPM (see Award, page 611, respondents' document 2-*bis*). The state-owned KazMunaiGas National Company ("KMG NC") and its subsidiary KazMunaiTeniz ("KMT"), were then entrusted with the management of the sites, with the exception of the LPG Plant, maintaining and preserving said sites on a non-profit basis.

3.3 ***The arbitration proceedings***

Five days after the contracts were terminated, on 26 July 2010, the respondents submitted a request for arbitration to the Arbitration Institute of Stockholm Chamber of Commerce, on the grounds that the RoK had breached its obligations it had undertaken under the Energy Charter Treaty, and claiming compensation for all the damages sustained, to be determined during the arbitration procedure (document 4).

The applicant defended itself in the proceedings, in the first place, claiming that the arbitration panel lacked jurisdiction, and, as to the merits of the case, denying any breach of the Energy Charter Treaty and therefore any consequent liability.

In the Award of 19 December 2013, and the Addendum of 17 January 2014 correcting the section relating to costs, the Arbitration Panel ruled that the RoK had breached the Energy Charter Treaty and ordered it to pay the respondents damages of USD 497,685,101 plus interest (see Award, page 415, respondents' document 2-*bis*).

* * *

IV. DISCOVERY OF FRAUD AFTER THE ARBITRATION PROCEEDINGS

4.1 *Fraudulent scheme against RoK*

During the course of the arbitration proceedings, the respondents claimed to have incurred costs equal to at least USD 245 million for the construction of the LPG plant, a fact which has and still is being disputed by RoK (see Award, paragraphs 1694 and 1712, respondents' document 2-*bis*).

The Arbitration Tribunal quantified the damages due on a cost basis in USD 199 million, equal to the amount offered by the company KazMunaiGaz Exploration Production (KMG EP) for the acquisition of the LPG Plant, on the basis of a preliminary offer which was expressly subject to the positive result of the due diligence to be carried out (see Award, paragraph 1747, respondents' document 2-*bis*).

Following the conclusion of the arbitration procedure, RoK became aware of a series of pending arbitration proceedings between Vitol and ASCOM concerning the joint-venture agreement, in which (i) ASCOM' attorneys were the same counsel who advised the respondents in the arbitration against RoK, and (ii) *inter alia*, the costs **actually incurred by the parties in constructing the LPG plant were discussed**.

The claimant in this case asked Vitol to be allowed to see the documents filed in the JOA arbitration concerning the construction costs for the LPG Plant. Although Vitol and its attorneys were willing to disclose the documentation, due to the confidential nature of the documents and the respondents' strong opposition, RoK was forced to commence proceedings in March 2015 in the United States District Court for the Southern District of New York ("the New York Court") requesting the disclosure of said documentation.

On 30 March 2015, **the New York Court upheld RoK's application and ordered that the documents be disclosed**; the order was then confirmed on June 22, 2015 when the opposition filed by the Statis and their companies was rejected (doc. 5).

The documents finally obtained by the RoK under this order (the "Discovered Documents"), and in particular the contract between TNG and Perkwood Investment Limited ("Perkwood"), revealed that the construction of the LPG Plant was part of a clear fraudulent scheme by which the Statis and the companies controlled by them have been able to (i) provide their investors with false information, (ii) defrauded the counter-party Vitol, and (iii) took considerable sums of money out of Kazakhstan.

4.2 *The circumstances disclosed*

Specifically, the fraud involved the false representation of the costs incurred for the construction of the LPG Plant, which were fraudulently inflated.

The following is an explanation of all the relevant circumstances, from which clearly appears the respondents' ultimate purpose.

Perkwood was incorporated under English law in 2005, and then cancelled from the Register of Companies in 2011. It was a vehicle company, with no employees or oil and gas engineering know-how, and that, indeed, never carried out any activities. It was fully under the control of the Statis, who, beside having almost unlimited powers to represent the company (doc. 6), were also the beneficiaries of its current accounts opened in its name (doc. 7)[4].

It is worth to be noted that no connection between Perkwood, the Statis or their subsidiary companies emerged during the arbitration proceedings. Indeed, the notes to TNG's financial statements for 2007-2009, audited by leading auditing company such as KPMG, make no reference to Perkwood in the section on transactions with related parties (doc. 8, pages 9 and 10, pages 135F-104; 301-302 F-146 and F-147; 460F-138; 532F-51).

Moreover, respondents denied before the Stockholm Court of Appeal that Perkwood was a related company or in any case a company controlled by the Statis. Only in September 2016, when the powers of attorney issued by

[4] In the discovered documents concerning Perkwood's current accounts, the Russian sentence "Удостоверяю, что Бенефициарами денежных средств на счете являются: Идентификационные данные" means: "I declare that the beneficiary of the financial instruments relating to the account is". The document then gives the names and passport numbers of Anatolie and Gabriel Stati.

Perkwood and submitted became available to RoK and were filed in the annulment proceedings (see doc. 6), respondents could no longer deny the evidence of the facts.

The reason why Statis made so many efforts in hiding the relation with Perkwood is related to Perkwood's fundamental role in the respondents' fraudulent scheme. Indeed, by means of fictitious and simulated contractual relationships, Perkwood (company incorporated under English law), received huge quantities of money from other group companies (specifically TNG), which, in this way, were able to transfer funds out of Kazakhstan, obtaining significant tax benefits, and thus hugely inflating the cost for the construction of the LPG Plant. The sums paid to Perkwood then flowed into the current accounts of other related companies, including Azalia Ltd. ("Azalia", see doc. 10 and 11).

The Discovered Documents showed that

(i) TNG had entered into a contract with Perkwood for the purchase of equipment for the Plant that had already purchased by other entities, or which were never delivered and were not necessary to the Plant (see 4.2.1 below)

ii) Perkwood had accrued a credit against TNG as "management fee" relating to management services provided by Perkwood for the construction of the LPG Plant, in spite of the fact that Perkwood never provided any such services (see paragraph 4.2.2 below)

(iii) TNG simulated the purchase of an equipment from Perkwood which should have been necessary for the LPG Plant, in spite of the fact that this

equipment was never delivered or installed on the plant (see paragraph 4.2.3)

(iv) TNG's accounts show interest never accrued on costs which were never incurred (see paragraph 4.2.4 below).

4.2.1 *The Purchase Fraud*

In 2005, TNG entered into a contract for the construction of the LPG plant with Kaspy Asia Service Company Ltd ("KASCO"), which in turn signed certain sub-contracts with ASCOM and Azalia.

On January 31, 2006, as subcontractors, ASCOM and Azalia entered into an agreement with Tractebel Gas Engineering GmbH ("TGE"), a company which has no connection with the group, nor in any way related to the Statis. According to the agreement, TGE agreed to provide the majority of the equipment and other products required for the construction of the LPG Plant for a total amount of approximately USD 35.1 million; the original price of approximately USD 28 million slightly changed during the execution of the contract ("TGE Contract", doc. 12, pages 4 and 10).

The TGE Contract covered the supply of nearly all the goods, machinery and other products required for the construction and the development of the LPG Plant.

However, RoK did not know, until the Discovered Documents, that in February 2006, at the same time when the TGE Contract was signed, TNG signed another contract with Perkwood in which the latter agreed to provide more materials and machinery for the LPG plant for an initial amount of approximately USD 115

million, which was subsequently increased to over USD 191 million ("the Perkwood contract", doc. 13).

A comparison between the TGE and Perkwood Contracts (whose existence was concealed during the arbitration proceedings and did not come to light until afterwards), shows that the goods and materials that Perkwood was to provide to TNG **were exactly the same as those already purchased by TGE at a considerably lower price.**

Indeed,
(i) according to Annex 2 to the Perkwood Contract, TNG was to buy equipment from Perkwood for a total amount of USD 93 million. However, these goods that TNG was to purchase from Perkwood were exactly the same as those already acquired by TGE at the much lower cost of approximately USD 35.1 million (see doc. 13, annex 2, and doc. 12, Article 3, appendix 1, Article 3). This is also confirmed by TGE which, requested to provide an expert opinion on what clearly appeared to be an obvious duplication of costs, confirmed that it had already supplied and installed at the LPG Plant the goods mentioned in the aforementioned Annex 2 to the Perkwood contract (doc. 14, pages 23-27).

(ii) Under Annex 14 to the Perkwood contract, TNG agreed to acquire additional supplies from Perkwood for a total of approximately USD 31 million. However, not only the goods that Perkwood was meant to supply had already been delivered by TGE (see doc. 12, appendix 1, Articles 3.3 and 3.5), but, moreover, these were the same goods that Perkwood was to supply under Annex 2, described differently and in more detail (see document 14, pages 28-32).

(iii) Under Annex 16 to the Perkwood contract, TNG was to buy goods from Perkwood for a total amount of approximately USD 290,000. In addition to the

fact that, also in this circumstance, the supply refers to a liquid used to operate the LPG plant which had already been supplied by TGE (see document 12, appendix 1, paragraph 6.1.5[5], and document 14, pages 32-33), it appears that Annex 16 was signed in May 2009, when construction of the LPG Plant had already been stayed and abandoned (see Award, paragraph 441, respondents' doc. 2).

If, on the one hand, it is clear that Perkwood never supplied any of the goods mentioned in the aforementioned annexes, on the other, it clearly appears that the contracts concealed, behind a veneer of legitimacy based on the stipulation of [apparent] rights and obligations by the parties, the transfer of huge sums of money from Kazakhstan straight to Perkwood's foreign accounts, managed by the Statis.

4.2.2 *Management fee Fraud*

The Discovered Documents also show that TNG paid to Perkwood a management fee of approximately USD 44 million, for which there is no evident legal basis (document 15, paragraphs 61-62)[6].

During a judicial proceedings between ASCOM and Vitol for challenging precautionary measure against ASCOM, the Judge Dr Cook ascertained that no management fee was provided for under the Perkwood contract, and therefore this was an unlawful payment (doc. 16, paragraph 39).

[5] Appendix 1 section 6.1.5 to the TGE contract states that the first delivery of sMDEA (the liquid) was included in the price agreed with TGE.
[6] The evidence submitted in the arbitration between ASCOM and Vitol by Mr. Lungu, ASCOM's director, showed that Perkwood charged TNG USD 44 million in service costs.

Also, from a logical point of view, it is hard to understand how a company that was inactive between 2006 and 2009 – and which, as a consequence of this, was authorised to submit a specific form of financial accounts, known as dormant accounts under English law – could accrue a credit for the provision of goods and services specifically during this time (doc. 17, pages 25, 31, 37, 43, and 61)[7].

Finally, Mr Zaja, an engineer employed by TGE who was personally involved in the construction of the LPG plant, testified in the English proceedings currently pending for the opposition to the Award in the UK (see paragraph 5.2 below) that he had never heard of a company called Perkwood being involved in supplying items alongside TGE and other companies known to be involved in the project, or having met any employees or other individuals associated with it (doc. 18, paragraph 9).

4.2.3 *Fake purchase by Perkwood of a machine that was never delivered*

The Discovered Documents, and specifically the report by ASCOM's expert witness, also show that TNG capitalised the amount of approximately USD 72 million for the purchase of an unspecified item of equipment allegedly delivered by Perkwood but never incorporated into the LPG plant (see doc. 8 paragraph 28; doc. 9 appendix 4, paragraphs 16 and 48-56; doc. 19, paragraphs 3.3.5 and 3.3.6, and table 4 to paragraph 3.3.6).

When the construction of the LPG plant was abandoned, at the beginning of 2009 (see Award, paragraph 441, respondents' document 2), it was approximately 80-90% complete, so it is not clear what purpose this new item of equipment was intended to serve, whose price was even twice the price agreed with TGE for the

[7] Pages 25, 31, 37, and 43 of Perkwood's financial statements for 2007-2009 show the company code 9999, allocated by the chamber of commerce to non-active companies, as stated on page 61 of document 17.

construction of the whole LPG plant (see above, paragraph 4.2.1), nor it is clear the reason why it was never incorporated (see document 14, paragraph 113).

4.2.4 Fictitious interest

Since the costs incurred by TNG to construct the LPG plant were fictitious, it follows that the interest accrued on the above costs must also have been non-existent.

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V. PROCEEDINGS IN OTHER JURISDICTIONS

5.1 ***Opposition to the Award and addendum in the country of origin***

RoK challenged the Award before the Stockholm Court of Appeal, asking that it be annulled for the following reasons:

(i) It was contrary to public policy, since the Award was the result of a fraudulent scheme and since it was based on false information and evidence, discovered only after the arbitration proceedings, once the Discovered Documents became available.

(ii) The Arbitral Tribunal lacked jurisdiction because there was no valid arbitration clause.

(iii) The Arbitral Tribunal was not constituted in accordance with the rules of the Arbitration Institute ("the SCC rules"), and thus with the parties' agreement.

(iv) The Arbitral Tribunal's final decision on the Award had been affected by procedural irregularities.

In its judgement of December 9, 2016, the Stockholm Court of Appeal rejected RoK's application. With reference to the claim that the Award was contrary to

public policy, the Court of Appeal **did not consider the merits of the fraudulent scheme,** but simply stated that even if the evidence submitted during the arbitration procedure was proved false, this circumstance would not be suitable or legitimate for the Award to be annulled. In the Court's opinion, it was not possible to state with absolute certainty that the Arbitration Tribunal's decision has been affected by the false evidence and testimony[8] (respondents' docu. 5).

The claimant was not understandably satisfied with a judgment which acknowledged that the arbitration award may have been based on false evidence and fraudulent intentions but deemed it not relevant to the outcome of the proceedings. The claimant therefore submitted a special appeal to the Swedish Supreme Court.

On 27 October 2017, the Supreme Court rejected the appeal with a completely **unmotivated judgement** (see respondents' document 7-*bis*).

5.2 ***Recognition and enforcement of the Award in other States***

The respondents commenced judicial proceedings in several jurisdictions – firstly, in the United Kingdom and in the United States – to have the Award recognised and enforced in those jurisdictions.

[8] See Stockholm Court of Appeal judgment of 9 December 2016, page 41, respondents' document 5-*bis*, which states: "…the evidence submitted by the investors in the form of witness statements, affidavits and expert reports concerning the cost of the investments, evidence which Kazakhstan states to be false, were not of decisive importance in the outcome of the arbitration. This Court believes that in these circumstances too, even **if the evidence is false, it does not justify annulling the Award. Neither it is obvious, according to the Court, that this evidence indirectly influenced the arbitration tribunal and was decisive in the Award."**

5.2.1 An enforcement proceedings is currently pending in the United States, though the RoK has not been able to introduce the Fraud claim as further reason for opposing execution of the award.

However, the English High Court of Justice proceedings commenced by the respondents in February 2014 to obtain recognition of the Award is significant. During the *ex parte* phase of the proceedings, the High Court stated that the Award and Addendum were recognised in the United Kingdom, just as this Court has done in the current proceedings.

RoK challenged recognition of the Award on the basis of the same grounds raised in this opposition[9].

On 6 June 2017, the English Court ruled that the circumstances of the case, and particularly the fact that **the Award was contrary to public policy because it had been obtained by fraud**, required the question to be examined in greater depth. It stated that **the Swedish judgements were not sufficiently comprehensive** because they did not provide adequate and in-depth reasons, and concluded that there were no grounds to reject the opposition (doc. 20).

After examining both parties' arguments, the English Court stated **that based on a preliminary assessment, RoK had provided sufficient evidence of fraudulent scheme**[10], and that **the courts in Sweden and the United States had not considered the merits of the case when examining the fraud**

[9] The first brief, submitted on 7 August 2015, was followed by another on 27 August 2015 when RoK obtained the Discovered Documents and thus became aware of the fraud. However, it subsequently dropped this opposition in light of the English principle of estoppel, which restricts the right to claim arguments already considered by other courts.

[10] See document 20, paragraph 92: "There is a sufficient prima facie case that the Award was obtained by fraud".

perpetrated against RoK, despite the nature and relevance of the evidence submitted by RoK[11].

The parties therefore exchanged pleadings (doc. 21) and the proceedings continued. Both parties were required to submit, by March 1, 2018, certain documents deemed relevant for the purposes of the decision.

Three days before the above mentioned deadline, the respondents, clearly trying to avoid the disclosure of further documents, applied for a discontinuance in the UK proceedings, stating that they no longer wished the Award to be recognised and enforced in that country. In particular, they claimed that they were having difficulty in affording the costs of the proceedings, which is actually unlikely, especially considering that, **during the same period, they also commence recognition proceedings in Italy**. Even though RoK would in any case have benefited from the respondents' decision not to enforce the Award in the UK, it opposed the application for discontinuance and asked for the proceedings to be continued in order that that the existence of fraud could be ascertained.

On May 11, 2018, the **English Court rejected Statis' application** considering that (a) there was no evidence that they were having financial difficulties, which they deemed unlikely especially in view of the costs they had already incurred and the timing of the application for discontinuance, (b) the application was more likely due to a justified fear of losing the case[12], and (c) if it were established

[11] See document 20, paragraph 80: "No court has decided the question whether there has been the fraud alleged. Neither the Swedish court nor the US court nor English court has, although material has been put before those courts that would allow them to decide that question."
[12] "The real reason for the notice of discontinuance is that the Statis do not wish to take the risk that the trial may lead to findings against them and in favour of the State" (document 22, paragraph. 25).

that they had obtained the Award **fraudulently**, this **might also affect proceedings in jurisdictions other than the UK** (see doc. 22, paragraph 63).

5.2.2 Following the English Court's decision of June 6, 2017, the respondents commenced various proceedings to have the Award recognised and enforced in other States, including the Netherlands, Belgium, Luxembourg, and Italy.

In all of these jurisdictions, including Italy, the respondents failed to inform the relevant courts of the important, and potentially decisive decision of the English court.

In particular,

(i) In August 2017, the respondents commenced a judicial proceedings for having the Award recognised in Luxembourg and also obtained a precautionary measures for attaching funds of RoK's alleged debtor in that country. The opposition proceedings against the recognition of the Award is currently pending.

(ii) In September 2017, the respondents commenced judicial proceedings for having the Award recognised in the Netherlands; this proceedings is currently pending. At the same time, they also commenced a series of precautionary measures and obtained the attachment of approximately USD 22 billion held by Bank of New York Mellon ("BNY Mellon") and allegedly belonging to RoK. This measure was subsequently annulled by the Dutch court[13], which (i) deemed that RoK was not the owner of the funds held by BNY Mellon (also on the basis of a previous case law dated October 20, 2005 and concerning an other

[13] In particular, the respondents attached funds held by National Bank of Kazakhstan ("NBK") at BNY Mellon. However, **the Dutch Court ruled that BNY Mellon owed these assets to NBK, and not to RoK**.

proceedings in which RoK was involved[14]), (ii) censured respondents' behaviour for having failed to inform the Court during the *ex parte* phase that a similar application had previously been rejected.

Also in the Netherlands, the respondents obtained an order from the Court of Amsterdam authorizing the attachment of funds held by Samruk-Kazyna JSC. The order was obtained on a prima facie basis, and it has been challenged.

(iii) In November 2017 the respondents applied for the Award to be recognised in Belgium, and obtained an *exequatur* order which has been challenged by RoK. Also in Belgium, the respondents attached the same funds at BNY Mellon, allegedly owned by the RoK, for which they had already applied for such an order from the Dutch Court (document 23). The application for having the attachment revoked is currently pending.

* * *

VI. GROUNDS FOR OPPOSING THE RECOGNITION OF THE AWARD AND ADDENDUM IN ITALY

6.1 ***The Award contains provisions that are contrary to public policy (Article 840.5.2 of the code of civil procedure)***

Pursuant to Article 840.5 of the code, a foreign award could not be recognised and enforced if it contains provisions that are contrary to public policy. This requirement is of such importance for a foreign award to be recognised that it shall be verified by the judge both during the *ex parte* proceedings and in subsequent opposition proceedings.

[14] AIG Capital Partners Inc. *v*. Republic of Kazakhstan.

It is well-known that the criteria under Article 840, and most importantly the principle of compliance of the award with public policy, **are fundamental principles to the rule of law in Italy and in other jurisdictions**, and the court of the State in which the recognition is requested shall ensure that awards are in compliance with these criteria.

As for the nature and scope of public policy, there is a unanimous opinion that the international public policy shall be relevant, being it **the set of substantive and procedural principles** governing the courts of the jurisdiction where recognition is requested.

In this particular case, there are at least two closely connected reasons why the Award is contrary to public policy[15]:

(i) It is contrary to the principles of substantive public policy, because it allows the respondents to obtain a financial benefit by unlawful and fraudulent means. The fraudulent scheme has been prepared since 2006, long before the arbitration proceedings, and continued over subsequent years (see paragraph 6.1.1 below).

(ii) It is contrary to procedural public policy because it is based on the information and evidence (statements, expert witness reports, and accounting documents) that were found to be false after the arbitration proceedings ended (see paragraph 6.1.2 below).

[15] *Ex multis*, L. Salvaneschi, *L'Arbitrato*, in *Commentario del Codice di Procedura Civile*, edited by S. Chiarloni, comment below Articles 839-840 of the code of civil procedure, pp. 1000-1001, Zuchelli Ed., 2014; R. WOLFF, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Commentary*, C. H. Beck Hart Nomos, 2012, pp. 402 ff.

6.1.1 ***Award is contrary to substantive public policy***

We have already described the circumstances from which the respondents' fraudulent scheme against RoK, its own investors, and its trading partner Vitol, clearly appears. The fraudulent scheme, which was carried through the transfer of significant sums of money between companies controlled or otherwise related with the Statis, resulted in the duplication of the costs for constructing the LPG plant (see section 4 above).

In this context, it is clear that the Arbitral Tribunal, unaware of these circumstances emerged only after the arbitration proceedings, **awarded the respondents damages to which, not only, they were not entitled, but which moreover they obtained by fraud**. In particular, the fraud was realized trough a scheme prepared well before the arbitration proceedings, and independently from it, the aim of which was to obtained unlawful benefits from the respondents' investments in Kazakhstan.

It is clearly contrary to fundamental principles of Italian law, and thus a breach of public policy pursuant to Article 840,5,2, the use of a judicial instrument to achieve an unlawful objective, and, in particular, a criminal offence[16].

6.1.2 ***The Award is contrary to the principles of procedural public policy.***

[16] The Court of Cassation has ruled on the need to evaluate a party's substantive purposes independently of the means it uses to achieve them. In a tax case, it established a basic legal principle, derived directly from constitutional law, that a party may not obtain undue advantage from the abuse of legal instruments, even where there is no specific provision of law preventing this (SS.UU, 23 December 2008, no. 30055).

The Award was rendered on the basis of false evidence concocted by the respondents for the purposes of fraud and used in arbitration proceedings to obtain compensation for damages to which they were not entitled.

The concept of public policy under Article 840 of the code of civil procedure also includes fundamental procedural principles of the State where recognition is being applied for, which represent the minimum requirements for any judicial proceedings to be legally commenced and executed. **An award rendered on the basis of false evidence, discovered as false only after the proceedings ended, violates public policy in Italian law, and other fundamental Italian legal principles**[17].

As stated above, the Discovered Documents show that during the arbitration proceedings, respondents had

(i) testified false statements and filed documents containing false information concerning the cost for the construction of the LPG plant;

(ii) violated procedural order No. 2 by failing to submit a document whose disclosure was ordered by the Arbitral Tribunal, and which would have revealed the fraud.

The Respondents submitted false evidence concerning the cost for the construction of the plant

[17] The need to achieve a balance between the certainty of *res judicata* and substantive justice is well established in more mature case law: L.P. COMOGLIO, *Etica e tecnica del giusto processo*, Giappichelli, Turin, 2004, pp. 276 ff; L. PASSANANTE, *La prova illecita nel processo civile*, Giappichelli, Turin, 2017, pp. 303 ff: "Procedural institutions must not be ethically neutral and indifferent... They must have their own inherent procedural ethics... To accept evidence provided in violation of constitutionally protected rights... would be incompatible with the truth, equity, and justice on which procedural ethics is based."

The respondents have always stated to the Arbitral Tribunal, also through an expert witness report and testimonies provided by Anatolie Stati and others[18], that they had invested approximately USD 245 million in the construction of the LPG plant, thus claiming compensation for damages of this amount from RoK due to the loss suffered (see paragraph 1694 of the Award).
In support of their claim, full aware that said circumstances were false, they filed documents containing information that they knew to be untrue, including the following:

(i) TNG's financial statements for 2007-2009, which (a) made no reference to Perkwood in the section on transactions with related parties, in clear violation of international accounting standard No. 24 (see doc. 9, pp. 135F-104; 301-302 F-146 and F-147; 460 F-138; 532 F-51), and (b) showed construction costs of approximately USD 245 million for the LPG plant. This figure was false and fraudulently inflated, and included the sums paid to Perkwood under the simulated contract (see section 4 above).

(ii) The KMG offer, a document dated September 2008 in which KMG EP, a company controlled by RoK and interested in purchasing the LPG plant, valued the plant in the amount of USD 199 million on the basis of a provisional offer, subject to the favorable outcome of the due diligence (document 24, page 3). This figure too was in itself unreliable, since the offer was based entirely on the Information Memorandum dated August 2008, which provided a valuation of KPM's and TNG's assets for potential purchasers, and **which contained false information taken from said company's financial statements which, at least with reference to TNG, contained untrue information** (document 25, page 4). The section of the memorandum concerning the LPG plant (a) similarly inflated

[18] See document 21, pp. 17-19.

the value of the investment (see document 25, page 54) and (b) made no mention of Perkwood in the list of suppliers and/or other companies involved in the construction (see document 25, page 55).

The wording of the offer, which is also confirmed by the accounting firm that carried out a technical evaluation of the KMG offer (see document 8, paragraphs 25-29), shows that the contents of the Information Memorandum was used as a parameter to determine and quantify the preliminary offer (see document 24, page 3)[19].

The KMG offer, which, as we have seen, was based entirely on information that the respondents knew to be false and unreliable, **was decisive to the outcome of the arbitration, given that the USD 199 million referred to in the offer was used by the Arbitral Tribunal to quantify the damages due to the respondents in relation to the LPG plant** (see paragraphs 1746-1747 of the Award, and document 8, paragraphs 27-28).

The respondents violated the Arbitral Tribunal's procedural order No. 2

In addition to acting unlawfully, the respondents also breached an order by the Arbitral Tribunal.

In spite of the fact that the arbitrators ordered the parties to exchange all documents in their possession concerning the LPG plant construction costs (documents 26, pp. 75 ff.), the respondents deliberately failed to provide RoK with the Perkwood contract, which in light of the cost of approximately USD

[19] The KMG offer specifically states that the offer was based on the information memorandum and other publicly available details and that the valuation was therefore also dependent on this information (see document 24, Article 3, paragraph f).

191 million, represented a significant part of the total of USD 245 million they claimed to have paid.

It goes without saying that (i) as a rule, the compulsory nature of the disclosure of documents typical of an arbitration proceedings, helps to achieve a fair and correct award if all parties comply with the order to disclose all the relevant documents, otherwise representing a dangerous weapon in the hands of a party with no ethical concerns, and (ii) in this particular case, the failure to provide the contract was clearly a deliberate and negligent attempt to prevent RoK from discovering the fraudulent scheme and the fact that the costs of the LPG plant had been fraudulently inflated.

In this case, there is no doubt that the submission of false documents and deliberate concealment of the fraudulent scheme affected and influenced the award, for two reasons:

(i) **with reference to the RoK's liability for the all the damages claimed by respondents**: regardless of the obvious concerns in relation to the **reliability of the respondents' witness statements** (and of Anatolie Stati's testimony in particular), it should be noted that, for the purposes of establishing RoK's liability, the Arbitral Tribunal considered decisive the fact that the Kazakh financial authorities showed a particular interest in respondents' activities, which was symptomatic of an aggressive policy towards foreign investors. In light of the information discovered after the arbitration proceedings, it seems much more likely that the Kazakh authorities were interested in investigating the flows of money being moved within and outside Kazakhstan by the Statis' companies;

(ii) **with reference to the amount of damages awarded**: as regards the LPG plant, this seems a self- evident conclusion, given that the information provided

during the arbitration in such respect proved to be false and non reliable, **including the KMG offer used by the Arbitral Tribunal as a benchmark to quantify compensation due**. It is however most likely that the information which came to light following the conclusion of the Arbitration would have affected the Tribunal's evaluation also in respect of other items of damages.

Given the respondents' serious procedural violations during the course of the arbitration procedure, which inevitably influenced the Tribunal, compromised RoK's right to defense, and affected the content of the Award, the recognition of the Award and of the Addendum in Italy is a clear breach of procedural public policy principles, and in particular the principle of legality which must necessarily inform the course of judicial proceedings.

It is clearly relevant in this case, and this Court must undoubtedly take into account, that (i) legal traditions and cultures similar to Italian one consider the use of false evidence in arbitration proceedings as such as to justify refusal to recognise the foreign Award in their jurisdictions[20]; (ii) even final domestic judgments which are no longer subject to other forms of appeal may be reviewed and revoked in the event that they have been the result of false evidence.

6.2 *Arbitral Tribunal lacked jurisdiction (Article 840.3.2)*

6.2.1. A foreign award may be rejected on the ground that the parties have not agreed an arbitration clause that is legally valid on the basis of the laws

[20] The United Nations Commission on International Trade Law, UNCITRAL, has stated that arbitration awards should not be enforced if they are the result of fraud, deception, or corruption (doc. 27, par. 35), as occurred with the false documents submitted in European Gas Turbines S.A. *v.* Westman International Ltd., where one party provided a fraudulent expense report. The Paris Court of Appeal **ruled that an international award based on false evidence is contrary to French international public policy** (Cour d'Appel de Paris, 30 September 1993, doc. 28).

governing the agreement or, in the absence of the indication of such a law, on the basis of the laws of the State where the Award was rendered.

In this case, the arbitration clause was **Article 26 of the Energy Charter Treaty**, which states that proceedings may be validly brought only after the parties have attempted to reach an amicable solution, over a period of three months from the request from one of the parties (see document 2).

6.2.2 So then, **the respondents commenced arbitration proceedings** on July 26, 2010, only five days after the subsoil exploitation contracts had been terminated (see Award, paragraph 611, respondents' document 2-*bis*). **They made no attempt to reach a settlement, or to communicate with RoK in any way** (see doc. 4). Nor can the communications between RoK and other companies related to respondents be represented as attempts to reach a settlement as specified in the arbitration clause.

6.2.3 During the arbitration, RoK maintained that the Arbitral Tribunal lacked jurisdiction because the respondents had not tried to reach an amicable settlement and hence, the condition to which the validity of the arbitration clause is subject never occurred.

The Arbitral Tribunal rejected this claim on the grounds that (i) the requirement to attempt a settlement was procedural rather than jurisdictional, and (ii) for this reason, the subsequent suspension of the arbitration procedure for a period of three months - agreed after the commencement of the arbitration for trying to reach a settlement - remedied the original procedural defect (see Award, paragraphs 828-830).

6.2.4. However, we disagree with the Arbitral Tribunal's conclusions.

Firstly, based on Article 26 of the Energy Charter Treaty and the system of which it forms a part, it is clear that (a) **the party's consent** – RoK's consent in this case – to the arbitration clause **is subject to the occurrence of the condition precedent** that the parties spend three months trying to reach agreement before arbitration, and (b) **the attempt to reach a settlement over a period of three months is a jurisdictional requirement, failing which the party cannot be deemed to have consented to the arbitration clause**.

Moreover, this interpretation is widely confirmed by Arbitral Tribunal practice[21].

Secondly, the fact that the arbitration was suspended for three months for a settlement attempt, after it was already initiated, has no relevance under Article 26 of the Energy Charter Treaty, which actually requires that the attempt to reach a settlement be made before arbitration proceedings, not during them.

Also, (i) when RoK requested the suspension of the arbitration procedure in order to attempt an amicable settlement, it specifically stated that it was not waiving the jurisdictional exception due to the lack of a conciliation attempt (document 29), and (ii) it is well known that an arbitration clause requesting that a period must elapse before the proceedings are commenced is not only intended to achieve agreement between the parties, but also plays a key role in terms of the preparation of defence in arbitration.

[21] Murphy Exploration and Production Company International *v.* Republic of Ecuador, ICSID case no. ARB/08/4, decision on jurisdiction, 15 December 2010, para. 149. Enron Corp. and Ponderosa Assets LP *v.* Argentine Republic, ICSID case no. ARB/01/3, (Orrego Vicuña, president; Gros Espiell and Tschanz, arbitrators), decision on jurisdiction, 14 January 2004, para. 88.

6.3 *The Arbitral Tribunal was not constituted as agreed by the parties (Article 840.3.4)*

6.2.1 Recognition of a foreign award is also denied if the Arbitral Tribunal is not constituted in accordance with the parties' agreement.

Under the 1958 New York convention, the importance of a party's right to appoint its own arbitrator is reflected in the fact that recognition can be refused if this right has been denied. Indeed, the time and cost usually spent by the parties in selecting their respective arbitrators represent a sufficient element to appreciate their importance and role in the proceedings.

In the case, **RoK was not allowed to appoint its own arbitrator, who was actually appointed by the Arbitration Institute**.

6.3.2 On this point, it is important to clarify the rules that should have applied in this case, and then to consider how these rules were violated by the Arbitration Institute.

Article 26 of the Energy Charter Treaty does not specify the number of arbitrators, nor how they are appointed. Therefore, the relevant applicable rules were the SCC rules (doc. 30), which provide the following:

(i) should the parties be unable to agree upon the number of arbitrators, the number is determined by the Arbitration Institute (SCC rules, Articles 9 (iii) and 12)

(ii) should the parties do not appoint their own arbitrators within the specified time, the Arbitration Institution will do so on their behalf (SCC rules, Article 13.3).

6.3.3 Although these rules are very clear, the Arbitration Institute appointed an arbitrator for RoK without first (i) having determined the number of arbitrators, or (ii) having given RoK a deadline to appoint its own arbitrator.

- On July 26, 2010, respondents submitted a request for arbitration to the Arbitration Institute, proposing the Arbitral Tribunal be constituted of three arbitrators and appointing their own arbitrator (see doc. 4).

- On 5 August 2010, the Arbitration Institute forwarded the request to RoK, asking it to answer by August 26, 2010 (doc. 31). The communication was received by the relevant department of the Kazakh Ministry of Justice on August 11, 2010, as confirmed by the Minister (doc. 32, paragraph 13).

- On August 27, 2010, the Arbitration Institute wrote to RoK again, setting a new date of September 10, 2010 for a reply (doc. 33). This was received on September 1, 2010 (doc. 32, paragraph 21).

- On September 13, 2010, respondents asked the Arbitration Institute to appoint an arbitrator for RoK under Article 13.3 of the SCC rules. This application was forwarded to RoK, but was received by RoK only on September 23, 2010 (document 34).

- Only a few days later, on September 27, RoK received a new communication informing it that the Arbitration Institute had appointed Prof Lebedev as an arbitrator on its behalf, and that he had accepted (doc. 35).

Notwithstanding RoK objections, and RoK requests to appoint its own arbitrator (doc. 36), the Arbitration Institute rejected all such requests (doc. 37).

It is clear from these communications that the **Arbitration Institute never expressed an opinion concerning the number of arbitrators of the Tribunal, or granted RoK with a deadline to appoint its own arbitrator**. The only deadline set was for RoK's answer.

The conditions for the appointment of an arbitrator by the Arbitration Institute under Article 13.3 of the SCC rules were therefore not met.

6.3.4. Moreover, even if we were to agree that RoK had been required to appoint an arbitrator by the answer deadline - though this is not provided for under the SCC rules - these **terms would have been excessively restrictive** and would not have allowed RoK to carry out the important assessments necessary to appoint an arbitrator.

Also, the complexity of the case, the fact that the parties did not first try to reach an amicable agreement, the issues caused by the fact that many Justice Ministry officials did not speak English, and the fact that RoK is a state entity, are all elements which significantly affected its ability to mount an effective defence quickly.

It is not by coincidence that, (i) the ICSID convention grants state entity with 90 days to appoint their arbitrators (doc. 38), and (ii) in another proceedings before the Stockholm Chamber of Commerce, the Arbitration Institute had no hesitation in declaring invalid an appointment made on behalf of the Government which

was not placed in the position to be able to promptly appoint its own arbitrator (doc. 39).

Finally, the Arbitration Institute's appointment of an arbitrator was not only a procedural defect, **but actually compromised the State's ability to defend itself adequately during the proceedings** and this constitutes another reason to deny recognition of the Award under Article 840.3.2 of the code of civil procedure.

* * *

VII. REVOCATION AND/OR SUSPENSION OF DECREE'S ENFORCEABILITY

7.1 As anticipated, claimant became aware of the fact that some entities in Italy, including State Street Global Advisors Ltd., had received a garnishment request on May 3, 2018 for sums they allegedly owed to RoK[22].

7.2 We believe that **any enforcement commenced by respondents is unlawful, being the judgment and award not enforceable yet**. It is a well-known principle that an *ex parte* decree pursuant to Article 839 of the code of civil procedure cannot be immediately enforced at the time when it is issued, (being also not applicable Article 642 of the code), but can be enforced only **after 30 days have elapsed from the notice of the decree and no opposition is**

[22] Partly in consideration of cases already brought in the courts of other jurisdictions, this opposition is submitted without prejudice to any other opposition in relation to the fact that National Bank of Kazakhstan and its contracting parties and counterparties, such as State Street, are separate legal entities to RoK and are not liable for any sums payable by RoK to third parties, including the Statis.

commenced[23]. In this case, it appears that the respondents began enforcement proceedings on 3 May 2018, **long before** the end of the 30-day period during which RoK could have challenge the decree (see paragraph 1 above).

7.3 In the absence of any further information, claimant also requests that the enforceability of the decree by which the unlawful enforcement proceedings would have taken place be revoked and/or suspended for "serious grounds", pursuant to Article 649 of the code of civil procedure.

Indeed, the Court is required on the one hand to show discretion in view of the risk that enforcement could cause serious and irreparable damage to the debtor, and on the other, of the fact that the opposition is probably grounded[24]. In this case, the substantive grounds are

[23] See, *ex multis*, Corte Appello Genova, 21 June 2006, no. 1316 in *Dir. comm. internaz.* 2008, 3-4, 683: "**A foreign arbitration award recognised under Article 839 of the code of civil procedure is not immediately enforceable.** However, it may be made provisionally enforceable pending opposition under Article 648 of the code when the provision relating the order for payments is invoked under Article 840 of the code. The foreign award has the same evidentiary value as written evidence in debt collection proceedings. Provisional enforceability must be granted if the opposition is not based on evidence that is written or can be submitted immediately, but requires a decision to be made after a judgment in full possession of the facts, particularly when, in light of a summary evaluation of the opposition's *fumus boni juris*, it is highly unlikely based on the documents that it will be upheld" (our emphasis). See also Corte Appello Milano, 5 December 2006; Corte Appello Milano, 12 December 2006; Corte Appello Milano, 9 July 1996; Corte Appello Bologna, 27 May 1996; Corte Appello Milano, 12 July 1995.
In the literature, see AULETTA, *L'efficacia in Italia dei lodi stranieri*, in AA.VV., *Diritto dell'arbitrato*, edited by G. VERDE, Naples, 2005, 561; CAMPEIS-DE PAULI, *Il processo civile italiano e lo straniero*, Milan, 1996, 383; CICCONI, *Lodi stranieri (riconoscimento ed esecuzione)*, Turin, 1997, 318; CONSOLO, *Sulla provvisoria esecutorietà del lodo straniero tra art. 8409 c.p.c. e Convenzione di New York*, in *Corr. Giur.*, 1997, 709 ff., especially 712; PUNZI, *Disegno sistematico dell'arbitrato*, 2nd edn., 759 ff.

[24] See Trib. Roma, 21 December 2010, on *www.ilcaso.it:* "A case in which a debtor opposing an order for payment requests that provisional enforcement of the judgment be suspended under Article 649 of the code of civil procedure cannot be seen as intending to review the existence of the conditions for the granting of provisional enforcement under Article 642 of the code. Nor can it be seen as an evaluation of the non-recurrence of the conditions laid down in Article 648 of the code. This is because the important grounds resulting in suspension of provisional enforcement must affect only the risk that enforcement of the decree could seriously damage the debtor, and must make reference to the fact that the opposition is probably justified."

(i) **the fact that this opposition is clearly grounded**, with particular reference to the fact that the Award is contrary to public policy and violates substantive and procedural principles of Italian law (see paragraph 6.1 above).

(ii) **the high value** of the Award. Also taking into account the context of these proceedings, and the respondents' peculiar and proven ability to manage large flows of money, there is a very high risk that if the opposition is upheld, RoK will be unable to recover the amount paid, which will cause serious and irreparable damage to Kazakhstan's public finances.

7.4 Finally, we must point out that respondents have already obtained precautionary measures in other jurisdictions for significantly higher amounts than those specified in the Award (see doc. 23). In Belgium, in particular, they have obtained attachment orders against, amongst others, Bank of New York Mellon, for the sum of approximately USD 22 billion. This is clearly another reason to prevent any further enforcement action in Italy.

* * *

In light of the above, the Republic of Kazakhstan, represented, defended, and electing domicile as specified above,

HEREBY SUMMONS

See also, *ex multis*, Trib. Modena, 22 January 2014 n. 1654; Trib. Milano, 9 April 2005; Pret. Termini Imerese, 3 December 1996. In similar literature, see CONTE, *L'ordinanza di ingiunzione nel processo civile*, Padua, 2003, 382; SANZA, *La esecuzione provvisoria; concessione, sospensione e revoca*, in *Il procedimento d'ingiunzione*, edited by CAPPONI, Bologna 2009, 425.

- **Mr ANATOLIE STATI,** a Moldovan and Romanian citizen, born on 25 October 1952, resident at 20 Dragomirna St, Chisinau, MD-2008, Moldova, state identification number 0961610889327

- **Mr GABRIELE STATI,** a Moldovan and Romanian citizen, born on 30 September 1976, resident at 1A Ghioceilor St, Chisinau, MD-2008, Moldova, state identification number 0951807890164

- **ASCOM GROUP S.A.,** a company established under Moldovan law, domiciled at 75 A. Mateevici St, Chisinau, Moldova, MD-2009, Moldova, registered as a company on 25 March 1994, registration number 1002600006034, in the person of its legal representative *pro tempore*

- **TERRA RAF TRANS TRADING LTD**., a company incorporated under the law of Gibraltar, domiciled at 13/1 Line Wall Road, Gibraltar, registered as a company in the United Kingdom overseas territory of Gibraltar on 1 March 1999, registration number 68069, in the person of its legal representative *pro tempore*

all represented and defended in proceedings under Article 839 of the code of civil procedure by Counsel, Avvocati Michelangelo Cicogna, Silvia Doria, Chiara Caliandro, Prof. Raffaella Muroni, and Andrew Garnett Paton, who have elected domicile at their offices at Via Vincenzo Bellini, n. 24, Rome

TO APPEAR

Before the Court of Appeal of Rome at its usual address, in a Section and with a Presiding Judge to be designated, **at a hearing on 7 November 2018**, to file their fefence 20 days before the hearing for the purposes and in the form defined

in Article 166 of the code of civil procedure, and to appear at the specified hearing or any other scheduled hearings under Article 168-*bis* of the code of civil procedure, before the Judge appointed in said Article. It being noted that if they fail to constitute themselves within this period, they will lose their rights under Articles 38 and 167 of the code of civil procedure and that if they fail to appear the case will be judged in their absence, to hear the following

CONCLUSIONS

May it please the Court, having dismissed any claims, pleas and arguments to the contrary, and

(i) firstly, to order - either ex parte or, alternatively, with both parties present at a preliminary hearing before the first hearing in this case - that the enforceability of judgement no. 1287/2018 handed down pursuant to Article 839 of the code of civil procedure, be revoked or suspended for the reasons stated above.

(ii) on the merits of the case, ascertain the applicability of the grounds for denying recognition of the foreign arbitration award rendered on 19 December 2013 in case number 116/2010 before the Institute of Arbitration of Stockholm Chamber of Commerce, and the Addendum of 17 January 2014, for the reasons specified above, and thus to revoke recognition judgement no. 1287/2018 handed down under Article 838 of the code of civil procedure (RG no. 8412/2017).

And to award costs against the unsuccessful party.

We attach the following:

1. Application under Article 839 c.p.c. and decree;
2. Energy Charter Treaty;
3. Declaration by the Kazakhstan Minster of Justice;
4. Request for arbitration;
5. New York court order dated 22 June 2015;
6. Perkwood general powers of attorney 2005-2009;
7. Beneficiaries of Perkwood current accounts;
8. Deloitte expert report of 12 January 2017 and appendix;
9. Exhibits to the Deloitte expert report of 12 January 2017;
10. Azalia bank account;
11. Perkwood bank account;
12. TGE contract of 31 January 2006;
13. Perkwood contract of 17 February 2006;
14. TGE technical report dated 12 January 2017;
15. Witness Statement Mr Lungu on 11 October 2013;
16. Judgement of Dr Cooke;
17. Perkwood dormant accounts;
18. Witness Statement of Mr Zaja dated 27 August 2015;
19. Charles River technical report;
20. English court order of 6 June 2017;
21. RoK's points of claim before the English court;
22. Order by the English court dated 11 May 2018;
23. BNY Mellon positive declaration;
24. KMG offer dated 25 September 2008;
25. Information memorandum dated August 2008;
26. Procedural order no. 2;
27. United Nations Commission on International Trade Law, NY convention guide;
28. Paris Court of Appeal, 30 September 1993;

29. RoK lawyers' communication dated 18 January 2011 and emails by them dated 28 January 2011;
30. SCC rules;
31. Letter from the Arbitration Institute dated 5 August 2010;
32. Witness Statement of RoK Minister of Justice dated 17 July 2015;
33. Communication by the Arbitration Institute dated 27 August 2010;
34. Application by respondents dated 13 September 2010;
35. Arbitration Institute letter of 23 September 2010;
36. Letter from the RoK's lawyers to the Arbitration Institute;
37. Arbitration Institute letter dated 15 December 2010;
38. Extract from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States;
39. Arbitration Institute award during the Sudima proceedings.

We reserve the right to make further changes, and submit additional evidence and information during the proceedings.

* * *

Due to the timing (claimant did not become aware of the enforcement proceedings until 10 May 2018), and in view of the volume of documents submitted, we are providing an unsworn Italian translation of the sections of the documents we referred to. If necessary, we can submit sworn translations of these sections, and of other parts of the documents, into languages other than Italian and within a period specified by the Court.

* * *

This dispute is subject to a standard charge of €1,686.

Rome, 14 May 2018

Avv. Daniele Geronzi

Avv. Cecilia Carrara