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[seal:]* SUPERIOR COURT OF JUSTICE* GRAND DUCHY OF LUXEMBOURG

Ruling No. 133/19 - VIII - Exequatur

CIVIL RULING - EXEQUATUR

Public hearing of nineteen December two thousand and nineteen

Number CAL-2018-00013 of the docket.

Composition:

Lotty PRUSSEN, Presiding Judge of the Chamber;
Monique HENTGEN, First Judge;
Jeanne GUILLAUME, First Judge;
Alain BERNARD, clerk.

Between:

the REPUBLIC OF KAZAKHSTAN, represented by its President of the Republic currently in office, as well as by, where necessary, its Prime Minister currently in office, or by any other body authorised for this purpose, acting through the Department for Provision of court's activity 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, alternatively through the Ministry of Justice, represented by the Minister of Justice currently in office, established at 8, Orynbor Street, House of Ministries, entrance 13, 010000 Astana, the Left bank, Kazakhstan,

appellant under the terms of a deed prepared by the bailiff Véronique REYTER of Esch-sur-Alzette of 2 November 2017,

represented by the public limited company Arendt & Medernach, registered with the Luxembourg Bar, established and having its registered office in L-2082 Luxembourg, 41A, J.F. Kennedy, represented for these purposes **by Mr François KREMER,** barrister, residing in Luxembourg,

and:

1) the Moldovan company ASCOM GROUP S.A., established and having its registered office in MD-2009 Chisinau, Moldova, 75, rue Mateevici, represented by its Chairman currently in office, or by any other body authorised for this purpose;
2) Anatolie STATI, residing in MD-2008 Chisinau, Moldova, 20, Dragomirna road;

3) Gabriel STATI, residing in MD-2008 Chisinau, Moldova, 1A, Ghioceilor road;

4) the Gibraltar company TERRA RAF TRANS TRAIDING LTD., established and having its registered office in Gibraltar, 13/1 Line Wall Road, overseas British territory, represented by its Director currently in office, or by any other body authorised for this purpose;

respondents for the purposes of the aforementioned REYTER deed,

represented by the limited liability company NautaDutilh Avocats Luxembourg, registered with the Luxembourg Bar, established and having its registered office in L-1233 Luxembourg, 2, rue Jean Bertholet, represented for these purposes **by Mr Antoine LANIEZ,** Lawyer, residing in Luxembourg.

THE COURT OF APPEAL:

FACTS and BACKGROUND

Anatolie Stati holds all shares in the company Ascom Group SA (hereinafter referred to as "Ascom"), a Moldovan public limited company. Anatolie Stati and his son Gabriel Stati each hold one half of the shares of the company Terra Raf Trans Traiding Ltd (hereinafter referred to as "Terra Raf"), a limited liability company incorporated under Gibraltar law.

Between 1999 and 2005, Anatolie and Gabriel Stati, through Ascom and Terra Raf, acquired 100% of the shares of two Kazakh companies, namely the company Kazpolmunay LLP (hereinafter referred to as "KPM") and the company Tolkynneftegaz LLP (hereinafter referred to as "TNG"), which had the authorisation of the Republic of Kazakhstan (hereinafter referred to as "Kazakhstan") to explore and develop various oil and gas deposits in Kazakhstan in accordance with the subsoil use agreements.

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

Anatolie Stati is also 100% owner of the company Tristan Oil Ltd. (hereinafter referred to as "Tristan"), a British Virgin Islands company that 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 to construct a liquefied petroleum gas plant in Kazakhstan (hereinafter referred to as the "LPG Plant"), in collaboration with the oil company Vitol FSU B.V. (hereinafter referred to as "Vitol").

At the end of the year 2008, the Kazakh authorities revealed several serious violations committed in the context of operations carried out by KPM and TNG.

On 21 July 2010, the Ministry of Oil and Gas of the Republic of Kazakhstan terminated the soil use contracts of KPM and TNG. The oil fields were taken over, through a trust, by the state company KazMunaiGas oil (hereinafter referred to as " KMG") and by its subsidiary KazMunaiTeniz (hereinafter referred to as "KMT").

On 26 July 2010, Anatolie Stati, Gabriel Stati, Ascom and Terra Raf (hereinafter referred to jointly as "the Statis") introduced arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as the "SCC Institute") in Sweden, based on the *Energy Charter Treaty* (hereinafter referred to as the "ECT"), signed on 17 December 1994 for the purpose of promoting and protecting foreign investments in the energy sector.

Through an award of 19 December 2013, the Arbitral Tribunal decided that Kazakhstan violated its obligations to which it was bound by virtue of the ECT as it concerns the Statis investments and decided that Kazakhstan must pay the Statis an amount of US$ 497,685,101.00, plus late payment interest (of which US$ 199,000,000.00 was for damages and interest for the LPG Plant).

Through a corrective award of 17 January 2014, the Tribunal made a correction relating to the costs tied to the arbitration and set the distribution of arbitrators' fees.

An appeal by Kazakhstan seeking the annulment of the arbitration award was rejected through a decision of 9 December 2016 by the Court of Appeal of Stockholm (hereinafter referred to as the "SVEA Court").

An appeal against this decision before the Supreme Court of Sweden has not been accepted.

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

PROCEEDING

Through Order no. 40/2017 rendered on 30 August 2017, a First Deputy Presiding Judge of the District Court of Luxembourg, substituting the legitimately impeded Presiding Judge, declared the enforceability in the Grand Duchy of Luxembourg, as if it emanated from an indigenous jurisdiction, of the arbitration award of 19 December 2013 rendered by "The Arbitral Tribunal, Arbitration Institute of the Stockholm Chamber of Commerce", composed of Prof. Karl-Heinz BOCKSTIEGEL, Presiding Judge, David R. HAIGH, QC, Co-Arbitrator and Prof. Sergei N. LEBEDEV, Co-Arbitrator (hereinafter referred to as "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 hand.

Through the bailiff writ of 2 November 2017, the Republic of Kazakhstan lodged an appeal, on the basis of Articles 1250 and 682 of the New Code of Civil Procedure, against this order, which had been served on 2 October 2017.

It asked the Court,

- primarily, to find and state that the Award is contrary to the public order of Luxembourg, while it is the product of an offence, respectively of a fraud;

consequently, on the basis of Article V (2) b) of the New York Convention of 10 June 1958 for the recognition and enforcement of foreign arbitral awards (hereinafter referred to as the "New York Convention") or alternatively on Articles 1251 (2), 1244 (10) and 1244 (12) of the New Code of Civil Procedure, to refuse or revoke the enforcement of the Award, or alternatively to consequently order the annulment of the order of exequatur and state that it can have no validity whatsoever in the territory of the Grand Duchy of Luxembourg;

- alternatively, to find and state that the essential conditions of form posed in relation to the exhibits to be attached to the request for exequatur were not observed by the Statis;

consequently, on the basis of Article IV (1) a) of the New York Convention, or alternatively on Article 1250 of the New Code of Civil Procedure, to refuse or revoke the exequatur of the Award, or alternatively to consequently order the annulment of the order of exequatur and state that it can have no validity whatsoever in the territory of the Grand Duchy of Luxembourg;

- as a secondary alternative, to find and state that no valid arbitration agreement existed between the Statis and Kazakhstan;

consequently, on the basis of Article V (1) a) of the New York Convention, or alternatively on Article 1244(3) of the New Code of Civil Procedure, referred to in Article 1251(3) to refuse or revoke the exequatur of the Award, or alternatively to consequently order the annulment of the order of exequatur and state that it can have no validity whatsoever in the territory of the Grand Duchy of Luxembourg;

- as a third alternative, to find and state that the Award was rendered by an irregularly formed arbitral tribunal;

consequently, on the basis of Article V (1) b) of the New York Convention, or alternatively on Article 1244(6) of the New Code of Civil Procedure to which Article 1251 (3) of the New Code of Civil Procedure refers, to refuse or revoke the exequatur of the Award, or alternatively to consequently order the annulment of the order of exequatur and state that it can have no validity whatsoever in the territory of the Grand Duchy of Luxembourg;

- as fourth and final alternative, to find and state that the Republic of Kazakhstan must enjoy immunity of enforcement, which is intended to remove the assets of a sovereign country, from any enforcement measure and that therefore the

Award cannot be subject to the exequatur granted according to the order of 30 August 2017;

consequently, to refuse or revoke the exequatur of the Award, or alternatively to consequently order the annulment of the order of exequatur and state that it can have no validity whatsoever in the territory of the Grand Duchy of Luxembourg;

In any event, Kazakhstan requests that, where necessary, it offers to prove the following facts through testimony:

"1. The main equipment of the LPG Plant was delivered and their installation supervised by the German company TGE Gas Engineering GmbH (hereinafter referred to as "TGE"), for a total amount of around € 32 million. The Statis - via Azalia 000 (hereinafter referred to as "Azalia") and Perkwood Investment Limited (hereinafter referred to as "Perkwood") - sold the TGE equipment to the company Tolkynneftegaz LLP (hereinafter referred to as "TNG") for an amount of US$ 93 million, that is, the same equipment as those sold by TGE for US$ 35 million.

2. Perkwood is a company that was established by Sarah Petre-Mears on 14 September 2005. Throughout the entire period between September 2005 and July 2010, Perkwood was in fact controlled by the Statis, particularly by virtue of powers of attorney given by the sole director of Perkwood, Sarah Petre-Mears, to Anatolie Stati and Gabriel Stati on 2 November 2005, then renewed annually on 14 September 2006, 22 August 2007 and 26 August 2008, and to Anatolie Stati on 20 August 2009. However, the individuals who intervened on behalf of Perkwood in the documents produced by the Statis include other individuals, including the personal driver of Mr Anatolie Stati, Mr Eldar Kazumov, who did not have the knowledge required to validate such transactions, and for which the alleged power of representation of Perkwood has never been established by the Statis.

3. From 2006 to 2009, Perkwood was a business without an office or employees, and which filed dormant statements with the British Companies House.

4. Azalia is a Russian company, in which the Statis are neither shareholders nor directors. However, the Statis controlled Azalia during the period between September 2005 and July 2010. The sole director of Azalia, Mr Alexey Shorin, never heard TGE, Ascom, Perkwood or TNG mentioned. Azalia halted its activities in 2005, that is, prior to the start of the construction of the LPG Plant, and had no activity after this date until its liquidation in June 2016.

5. The contract entered into between Perkwood and TNG dated 27 March 2006 (Arendt exhibit no. 8.3) and the various Annexes and Addenda to this contract were signed on behalf of Perkwood by Elena Ozerova (Ascom accountant at the time of the facts) or Eldar Kasumov (personal driver of Anatolie Stati at the time of the events).

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

7. Neither Perkwood nor Azalia were mentioned as related parties in the 2007, 2008 and 2009 annual financial statements of the companies Tristan Oil Ltd., KPM and TNG.

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

9. The "Information Memorandum" of 8 August 2008 relating to the controlled auction for the sale of KPM and TNG was false, given that it was based on the 2007, 2008 and 2009 financial reports of the companies Tristan, KPM and TNG, which mention neither Perkwood nor Azalia as related parties.

10. After receiving a draft of the KPMG Report on 31 August 2008, which mentioned on several occasions that Perkwood was a company linked to the Statis, Mr Artur Lungu, on 8 September 2008, resent the draft to KPMG, manually deleting the mention of "related party". In the final version of the KPMG Report of 15 September 2008 appears the erroneous and deceitful mention of "third party. This final version of the KPMG Report of 15 September 2008, produced by the Statis during arbitration, was therefore materially a fake.

11. The Statis have also created management fees, out of thin air, for US$ 44 million, which were included in the amount paid by TNG to Perkwood."

Through a fax dated 9 October 2019, the agent for Kazakhstan, by reference to Article 418 of the New Code of Civil Procedure, supplemented the list of witnesses to be summoned.

Alternatively and where necessary, the appellant requests that, in accordance with Article 1358 of the Civil Code, it intends to defer to the parties Anatolie Stati and Gabriel Stati the decisory oath on the following facts:

"Perkwood Investment Limited and Azalia 000 were two companies controlled by Anatolie Stati and Gabriel Stati. This status "related company" was hidden in multiple documents, including the 2007, 2008 and 2009 financial statements of the companies Tristan Oil 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 of the KPMG Report and the letters of representation sent by the Statis to KPMG."

Even more alternatively, it asks the Court to give it the opportunity to modify the decisory oath to render it admissible.

The appellant also requests the filing of its criminal complaint with the status of civil party before the Investigative-Director Judge of 27 May 2019 and the payment of the deposit required, and it consequently requests that the ruling of this exequatur proceeding be stayed, in accordance with the principle of "the criminal keeps the civil in check".

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

Lastly, it requests that the respondents be sentenced to pay it jointly and severally, otherwise in solidum, or each for its own share, the amount of € 250,000, based on Article 240 of the New Code of Civil Procedure.

The respondents request, before any other progress in question, on the basis of Article 282 of the New Code of Civil Procedure, otherwise any other legal basis that the Court deems appropriate, to set aside from the proceedings the exhibits included by Kazakhstan in the introductory brief of this proceeding, for lack of timely communication, and that they defer to the court's prudence regarding the question of the validity of the appeal brief and regarding the admissibility of exhibits Nos. 108 and 109 filed by Kazakhstan.

They conclude for the rejection of the request to stay the ruling formulated by Kazakhstan and the confirmation of the order of exequatur of 30 August 2017.

They ask the Court to uphold that the enforcement of the Award is not contrary to public order of Luxembourg and that the conditions imposed by Article 1250 of the New Code of Civil Procedure in connection with the exhibits to be attached to the request for exequatur have been met, to confirm the validity of the arbitration agreement between Kazakhstan and to uphold that the Award was rendered by a regularly formed tribunal.

In addition, the respondents contest the applicability of immunity from enforcement in the context of this request for exequatur proceeding.

They conclude for the rejection of the offer of evidence filed by Kazakhstan in its submissions of 10 May 2019 as well as the inadmissibility or alternatively the rejection of the request for decisory oath.

Lastly, they request the allocation of a procedural indemnity of € 30,000 on the basis of Article 240 of the New Code of Civil Procedure and request to reserve the right to request the reimbursement of attorneys' fees incurred in the context of this case.

Following the transmission of the file in application of Article 183 of the New Code of Civil Procedure, the Prosecutor General's Office deferred to the wisdom of the Court.

Through letters sent to the Court during the deliberations, the agent for the appellant requested the suspension of the deliberations and the revocation of the order of closure in order to be able to file other exhibits and present other submissions.

Balancing the different interests in play and to the extent that the respondents have the right to see the appeal assessed within a reasonable timeframe in accordance with Article 6 of the European Convention on Human Rights, the Court does not order the suspension of the deliberations nor the revocation of the closure.

The various letters and exhibits that the agent for Kazakhstan filed over the course of the deliberations cannot be considered, in application of Article 65 of the New Code of Civil Procedure.

At the pleadings hearing, the agent for the appellant requested the revocation of the order of closure on the grounds that the audit firm KPMG, on 21 August 2019, withdrew all audit reports that it prepared on behalf of the companies KPM and TNG controlled by the Statis and that it intends to file new exhibits constituting proof of the fraudulent manoeuvres committed by the Statis to surprise the Award to which the exequatur is related and to take a position on this subject through additional submissions.

The respondents objected to the revocation of the order of closure on the grounds that the elements provided by the appellant have no impact on the pecuniary sentencing that Kazakhstan refuses to honour and, consequently, on the present dispute.

In order to determine whether these elements constitute serious grounds justifying the revocation of the order of closure, it is necessary to evaluate their pertinence in light of the arguments on the merits of the request for exequatur.

The Court shall consequently revert to this during the review of the grounds drawn from the violation of public order.

REASONS FOR THE DECISION

Regarding the respondents' request for rejection of exhibits

The respondents requested, at the outset, on the basis of Article 282 of the New Code of Civil Procedure, the rejection of 11 exhibits listed in the appeal brief of 2 November 2017, for lack of timely communication, given that they were only communicated to the respondents on 14 September 2018 by the counsel for the appellant.

Article 282 of the New Code of Civil Procedure provides that the "judge may exclude exhibits that were not timely filed".

If it is not contested that the documents listed in the appeal brief were communicated nearly a year after the notification of the appeal brief, it nevertheless remains that the respondents had sufficient time between the communication of the exhibits and the closure of the proceedings to analyse and take a position regarding said exhibits. Their rights of defence were therefore not harmed.

Exhibits 108 and 109 of the appellant (statements of Alexander Foerster and Matthew H. Kirtland), meanwhile, are not inadmissible as such, given that the respondents only criticise their relevance or their probative value.

The request for rejection of the exhibits shall therefore be rejected.

Regarding the appellant's request based on Article 1263 of the New Code of Civil Procedure

The appellant requests the deletion from the submissions of Nauta Dutilh Avocats Luxembourg S.à r.l. of 6 June 2019 of paragraph 2 (including the report filed in counterparty exhibit no. 64 entitled "Trip to the heart of a dictatorship"), 7 and 125.

The invocation of the report disseminated on 28 April 2019 on the Republic of Kazakhstan, which would have no relation to the subject matter of the present dispute, would be particularly unwelcome and defamatory.

The appellant emphasises the lack of relevance of the accusations made by the counterparties on page 9 of the summary submissions of Nauta Dutilh Avocats Luxembourg S.à r.l. of 6 June 2019, including paragraph 7, which is worded as follows: " *In light of the foregoing, it is logical that numerous reports do not fail to emphasise the importance of the corruption poisoning Kazakhstan and the functioning of its institutions, the pressure placed on foreign investors, the difficult that* exits *as well to enforce court decisions and the lack of independence enjoyed by the Kazakh judiciary vis-à-vis the Kazakh State*" and it observes that in paragraph 125 on page 78 of the summary submissions of Nauta Dutilh Avocats Luxembourg S.à r.l. of 6 June 2019, which is worded as follows: "*Perhaps this is common practice in Kazakhstan, but (fortunately) this is not the case in Luxembourg and in any member country of the Council of Europe (to which Kazakhstan is not a party)*" constitutes an affront against its honour.

As the appellant rightly recalls, it does not lie with the Luxembourg Court and tribunals to rule on the political and institutional organisation of the Republic of Kazakhstan, which is a sovereign country.

To the extent that the developments in question and the report concern the political system of Kazakhstan, they are irrelevant in the context of the present dispute and must be removed from the proceedings.

The legal context

The respondents claim that the provisions set out in Articles 1224 to 1251 of the New Code of Civil Procedure are rejected by the New York Convention, which is solely applicable to the enforcement of foreign judgments in Luxembourg and where the grounds for refusal listed by the New York Convention are strictly interpreted.

Article 1251 of the New Code of Civil Procedure sets out the grounds for refusal of exequatur. These reasons are indicated with the clarification that the judge refuses the exequatur "*Subject to the provisions of international conventions, …".*

Article 1251 of the New Code of Civil Procedure should be interpreted in this sense that, in the event of application of the New York Convention, for the recognition and enforcement of foreign arbitration awards, the provisions of Article 1251 do not apply and that the judge takes into account only the provisions of the Convention.

The Arbitration Award in question was rendered in Sweden, where the New York Convention is in effect, and the enforcement is pursued in Luxembourg, where the Convention is also in effect.

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

The exequatur of the Award is therefore governed by the New York Convention, and the exequatur shall be rejected under the conditions of this Convention and not under those set out in Article 1251 of the New Code of Civil Procedure.

Article V, paragraph 1 of the Agreement for the recognition and enforcement of foreign arbitration awards, signed in New York on 10 June 1958, approved in Luxembourg following the Law of 20 May 1983, is worded as follows:

Article V
1. The recognition and enforcement of the judgment shall only be refused, on the request of the party against which it is invoked, if this party provides proof to the competent authority of the country where the recognition and enforcement are requested:

a) That the parties to the convention cited in Article II were, by virtue of the law applicable to them, incapable, or that said convention is invalid by virtue of the law to which the parties were subject or, in the absence of an indication in this regard, by virtue of the law of the country where the award was rendered; or

b) That the party against which the award is invoked was not duly informed of the designation of the arbitrator or of the arbitration proceeding, or that it was impossible for it, for another reason, to argue its case; or

c) that the award relates to a dispute not cited in the commitment or not falling under the provisions of the arbitration clause, or that it contains decisions that fall outside the terms of the commitment or of the arbitration clause; however, if the provisions of the award that involved issues subject to arbitration may be dissociated from those that involves issues not subject to arbitration, the former may be recognised and enforced; or

d) That the composition of the arbitral tribunal or the arbitration proceeding was not in accordance with the convention of the parties or, in the absence of a convention, that it was not in accordance with the law of the country where the arbitration took place; or

e) That the award has not yet become binding for the parties, or has been annulled or suspended by a competent authority of the country in which, or under whose law, the award was rendered.

2. Recognition and enforcement of an arbitration award may thus be refused, if the competent authority of the country where recognition and enforcement are required establishes:

a) That, according to the law of that country, the subject matter of the dispute is not eligible to be settled through arbitration; or

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

According to Kazakhstan, the exequatur of the Arbitration Award must be refused, given that:

i. both the Arbitration award as well as its enforcement are contrary to the public order of Luxembourg, while since the Award was rendered, it was discovered that several documents as well as other elements of proof that had a decisive impact on the Award were withheld and concealed by the Statis – these documents now prove that the Award was fraudulently obtained;
ii. the conditions established in connection with the documents to be attached to the request for exequatur have not been satisfied;
iii. no valid arbitration agreement exists;
iv. the Arbitration Award was rendered by an irregularly formed Arbitral Tribunal;
v. the Republic of Kazakhstan is eligible for immunity from enforcement.

For the sake of legal logic, we must first analyse the grounds relating to the proceeding before reviewing the arguments on the merits.

- **1. On the conditions established in connection with the documents to be attached to the request for exequatur**

The appellant's arguments

Kazakhstan asserts that, contrary to the provisions of Article IV(1) of the New York Convention, the Statis only produced, in support of their request for exequatur, a simple copy of the Arbitration Award and of the arbitration agreement, which, however, did not satisfy the conditions required for its authenticity.

The respondents' arguments

The respondents claim that as it concerns the Award, a copy satisfying the conditions necessary for its authenticity was indeed provided to the tribunal, as indicated in the list of exhibits inserted in the request for exequatur of 24 August 2017, namely a copy certified by the Arbitration Institute of the Stockholm Chamber of Commerce, which itself rendered the Award. The stamp of the arbitration institution also appeared on each page of the Award of 19 December 2013 and of the corrective Award of 17 January 2014, and the first and last pages of both parts of the award contained the signature of a representative of the Arbitration Institute of the Stockholm Chamber of Commerce.

As it concerns the arbitration agreement, the obligation to produce the original would not have been applicable because the arbitration agreement applicable in this case was not a contract - as is the case in the context of commercial arbitration - but was an investment arbitration proceeding based on Article 26 of the ECT dated 17 December 1994 and 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. For the recognition and enforcement referred to in the preceding article, the party seeking the recognition and enforcement must provide, at the same time as the request:
a) The duly authenticated original of the award or a copy of this original satisfying the conditions required for its authenticity;

b) The original of the agreement cited in Article II, or a copy satisfying the conditions required for its authenticity;

2. If said award or agreement is not worded in an official language of the country where the award is invoked, the party seeking the recognition and enforcement of the award must produce a translation of these exhibits in this language. The translation must be certified by an official or sworn translator or by a diplomatic or consular agent.".

Under the terms of Article 1250 of the New Code of Civil Procedure:

"The exequatur of an arbitration award rendered in a foreign country is granted by the presiding judge of the district court, referred to via request.
The request is brought before the presiding judge of a district court in the form in which the party against which the enforcement is requested has its domicile and, in the absence of a domicile, its residence. If this person has no domicile or residence in Luxembourg, the request is brought before the presiding judge of the district court of the place where the award must be enforced.
The petitioner must elect domicile in the district of the court to which the request was referred.
It attaches to its request the original of the award and of the arbitration agreement or a copy satisfying the conditions necessary for their authenticity.
For the rest, the rules applicable to the enforcement of foreign judgments rendered in accordance with an agreement on the recognition and enforcement of such judgments are observed."

It follows from the list of documents included in the request for exequatur of 24 August 2017, as well as from the filed exhibits in question, that the Statis had attached to the request for exequatur a copy of the Award of 19 December 2013 and of the corrective 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 two awards certified by a sworn translator.

They had also attached to it a copy in French of the ECT based on which the arbitration was entered into.

The conditions relating to the exhibits to be attached to the request for exequatur were therefore satisfied.

- **2. On the validity of the arbitration agreement in relation to the cooling off period and the company Terra Raf**

The appellant's arguments

1. The Republic of Kazakhstan opposes the recognition and enforcement of the Award in Luxembourg based on the violation of the *cooling off period* imposed by Article 26 of the Energy Charter Treaty, which would in turn constitute an underlying condition for the competence of the Arbitral Tribunal and a procedural rule inherent to the validity of the arbitration clause on which the Statis (and the Arbitral Tribunal) based their arguments. Indeed, the Statis submitted their request for arbitration on 26 July 2010, that is, only 5 days after the end of certain contracts, and they at no point notified the Republic of Kazakhstan of their intention to initiate arbitration, just as they did not attempt to amicably resolve the dispute.

2. The appellant then asserts that the company Terra Raf is not an "investor" in the sense of the ECT, given that it is a company incorporated and existing under the laws of Gibraltar. According to Kazakhstan, since the ECT does not apply to either Gibraltar or to the companies subject to Gibraltar Law, Terra Raf could not be an "investor" in the sense of the ECT and, as Terra Raf lacked this status, no arbitration agreement could have been formed between Terra Raf and the Republic of Kazakhstan.

The respondents' arguments

1. The respondents assert that, without prejudice to the fact that the requirement of a *cooling off* period is not a mandatory pre-requisite for the use of arbitration by virtue of the ECT, the parties, at the request of Kazakhstan on 18 January 2011, to which the Statis agreed on 24 January 2011, they nevertheless agreed to a stay of three months for the purpose of allowing the parties to reach an amicable settlement and in no way to prepare for arbitration. By accepting this stay, Kazakhstan also explicitly waived invoking any argument on the basis of Article 26, Section 1 of the ECT. In addition, the argument alleging a violation of the "*cooling off"* period was expressly rejected by the SVEA Court.

Moreover, the Statis, starting in October 2010, the start of the Kazakh violations of the ECT, repeatedly tried to amicably dissolve the dispute between the parties.

2. As it concerns the grievance relating to Terra Raf's non-investor status, the respondents reply that as no revocation of the declaration of the United Kingdom concerning Gibraltar was made, the ECT became binding with regard to Gibraltar when it took effect for the United Kingdom.

Furthermore, the European Union is a contracting party of the ECT so that, in accordance with Article 355 (3) of the Treaty on the Functioning of the European

Union, EU treaties would apply to European territories whose foreign affairs are managed by a Member State, which includes Gibraltar.

Assessment

- *Cooling off period*

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

"1. *Disputes between a contracting party and an investor of another contracting party on the subject of an investment made by the latter in the zone of the former and which involve an alleged violation of an obligation of the first contracting party under part III are, to the extent possible, resolved amicably.*

2. If any dispute of this kind could not be settled in accordance with the provisions of paragraph 1 within a period of three months from the date on which one of the parties to the dispute requested an amicable settlement, the investor party to the dispute may choose to submit it, with a view toward its settlement:

a) to the judicial or administrative courts of the contracting party that is party to the dispute; or

b) pursuant to any applicable dispute settlement procedure previously agreed upon; or

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

3) a) Subject to only points b) and c), each contracting party gives its unconditional consent to the submission of any dispute to an international arbitration or conciliation proceeding, in accordance with the provisions of this article.

b) i) The contracting parties listed in Annex ID do not give this unconditional consent if the investor has first submitted this dispute according to the procedures defined in paragraph 2), points a) or b).

ii) For reasons of transparency, each contracting party indicated in Annex ID sends its policies, practices and conditions on this matter in writing to the Secretariat by no later than the filing date of its instrument of ratification, acceptance or approval, in accordance with Article 39, or the filing of its instrument of adhesion, in accordance with Article 41.

c) The contracting parties listed in Annex IA do not given this unconditional consent for disputes arising on the subject of the provision contained in the last sentence of Article 10, paragraph 1.
(...)"

The Arbitral Tribunal, having been referred the same findings of Kazakhstan as the Court currently has, had upheld its competence by considering that it had granted, on 22 February 2011, in accordance with the parties, a suspension of proceedings in order to reach an agreement to settle this dispute and that, during this period,

settlement negotiations were initiated. Given the clear intention of Article 26 (1) and (2) if the ECT, after the failure of the discussions during the three-month period granted, no harm was done to any of the parties.

The SVEA Court also rejected the same arguments of Kazakhstan seeking the annulment of the Award for not being covered by a valid arbitration agreement between the parties based on the violation of the *cooling off* period by considering, after a detailed analysis, in summary, that an arbitration agreement between the Statis and Kazakhstan, which conferred to the court the competence to review the dispute between the parties, was concluded based on the request for arbitration of the Investors against Kazakhstan, which was submitted to the SCC on 26 July 2010, whether or not the conditions listed in paragraph 2 of Article 26 of the ECT had been satisfied at the time of the request.

By virtue of Article 26 cited above, Kazakhstan gave its unconditional consent to arbitration subject only to two exceptions, which do not relate to the *cooling off* period. Indeed, under the terms of Section 3, the parties' consent is subject only to paragraphs b and c. The *cooling off* period is therefore not a valid condition of the arbitration clause, but a simple procedural requirement, which was respected, given that the Arbitral Tribunal granted, at Kazakhstan's request, a procedural suspension over the course of which the parties initiated negotiations in order to reach an agreement to settle this dispute.

- *Investor status of Terra Raf*

The Arbitral Tribunal had upheld that the ECT applies to Gibraltar on the grounds that Gibraltar is a member of the European Union, which is itself a party to the ECT and that, according to Article 52 of the Treaty on the European Union and Article 355 of the Treaty on the Functioning of the European Union, Gibraltar forms part of its territory.

It is observed from exhibit no. 16 filed by the respondents (letter from the counsel for Kazakhstan of 21 March 2016) that Kazakhstan chose to abandon its grievances on this point in the proceeding 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 of the ECT.

The Court joined the conclusion of the Arbitral Tribunal by deducing that the ECT applies to Gibraltar. The grounds drawn from the lack of investor status of Terra Raf must therefore be rejected.

- **3. On the formation of the Arbitral Tribunal**

The appellant's arguments

Kazakhstan asserts that the provisions of Article V(1) b) and d) of the New York Convention have been violated, while, on one hand, it has not been duly and timely informed of the designation of the arbitrators, nor their method of designation, respectively of the arbitration proceeding. On the other hand, the formation of the

Arbitral Tribunal was not formed either according to the will of the parties or the arbitration agreement, which was never validly formed between the parties.

Kazakhstan claims more specifically that the appointment of Mr Lebedev violates the applicable rules since the Board of the SCC did not observe its own rules as well as the arbitration agreement. Moreover, the Board has not given formal notice to Kazakhstan. This fact violates the rights of the Kazakhstan to appoint its own arbitrator within an international arbitration having a substantial financial interest.

Given that the parties have not agreed on a timeframe regarding the appointment of an arbitrator, the Board of the SCC should have, on the basis of Article 13 (3) of the SCC Rules, determined a timeframe in order to proceed with such appointment, which was not done. Thus, as no timeframe was expressly defined, the Board had no right to appoint itself an arbitrator.

Moreover, an *ex parte* award rendered by the Board at the Statis request is contrary to the principles of due process.

Finally, by appointing Mr Lebedev, the Board violated Article 13(6) of the SCC rules by failing to take into account the nature and circumstances of the case at hand.

The respondents' arguments

The respondents argue that the appellant had at least 30 days to appoint its arbitrator. However, it did not declare it and at no time requested an additional timeframe concerning the issue of the formation of the tribunal. Failure to comply with its obligation to appoint an arbitrator within the prescribed timeframe in accordance with the applicable rules would constitute a violation of the arbitration agreement by Kazakhstan that would be sanctioned, pursuant to the Swedish law on arbitration and the Arbitration Regulations of the SCC, by the loss of the appellant's right to designate its arbitrator. The Arbitration Institute was thus authorised to appoint Professor Lebedev.

The allegations according to which the appellant was not timely informed of the designation of arbitrators and according to which the formation of the Arbitral Tribunal was not in accordance with the will of the parties and with the arbitration agreement are absolutely unfounded, which was also upheld by the SVEA Court and the United States District Court for the District of Columbia.

Assessment

It is observed from the documents of the arbitration proceeding that on 26 July 2010, the Statis submitted their request for arbitration to the arbitration institute of the Stockholm Chamber of Commerce. In this request, they proposed that the dispute be settled by a tribunal composed of three arbitrators, they designated their own arbitrator and proposed that the two arbitrators appointed respectively by the parties appoint the presiding judge of the Arbitral Tribunal. They also indicated that in accordance with Article 13 (3) of the Arbitration Institute of the Stockholm Chamber of Commerce, the SCC Institute must itself appoint the arbitrators if Kazakhstan does not appoint an arbitrator or if the two arbitrators appointed by the parties do not reach an agreement concerning the presiding judge.

On 5 August 2010 the SCC sent a copy of the request for arbitration to Kazakhstan along with the Regulations adopted by the parties – which call for Kazakhstan to appoint its own arbitrator – by requesting it in English to respond 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.

As the period ended without any response from Kazakhstan, the SCC sent it on 27 August 2010 a reminder in English, extending until 10 September 2010 the period previously granted and informing it that the lack of response would not prevent the arbitration proceeding filed by the Statis from continuing normally. Kazakhstan received this letter on 31 August 2010.

In the absence of a response from the Kazakhstan within the period, the Statis on 13 September 2010 asked the SCC to appoint an arbitrator on behalf of Kazakhstan in accordance with Article 13 (3) of the Arbitration Regulations of the SCC. This request was sent on the same day by registered letter to Kazakhstan, which acknowledged receipt on 23 September 2010.

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

On 23 September 2010, the SCC informed the parties of the appointment made, Kazakhstan having received this decision on 27 September.

On 27 September 2010, the SCC appointed Professor Karl Heinz Boeckstiegel as Presiding Judge of the Arbitral Tribunal and informed the parties by letter dated 28 September 2010, received on 1 October 2010 by Kazakhstan.

In a letter dated 2 December 2010, Kazakhstan challenged the appointment of Sergei Lebedev as arbitrator.

On 15 December 2010, the SCC rejected the objection of Kazakhstan on the subject of Prof. Lebedev, finding no grounds for disqualification.

The SVEA Court also rejected Kazakhstan's claims concerning the appointment of the arbitrators.

Under 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 attached documents to the Defendant. The Secretariat shall set a period during which the Defendant must submit a Response to the institute of the SCC. The Response must contain (...) any comments on the number of arbitrators and the seat of arbitration and, where applicable, the name, address, telephone number, fax number and email address of the arbitrator appointed by the Defendant.
(...)
(3) If the Defendant does not submit a Response, this does not prevent the arbitration from taking place.

Under the terms of Article 7, *"The Board may, at the request of one of the parties or on its own initiative, extend any deadline established in order to allow a party to comply with a particular directive".*

Article 13, relating to the appointment of arbitrators, establishes that:

"(1) The parties are free to agree on a different procedure for the appointment of the Arbitral Tribunal than the one specified in this Article. In such a case, if the Arbitral Tribunal was not appointed within the period agreed to between the parties, or if the parties did not agree to a period, within the period set by the Board, the appointment shall take place in application of paragraphs (2) to (6).

(2) ...

(3) If the Arbitral Tribunal consists of more than one arbitrator, each party shall appoint an even number of arbitrators and the Presiding Judge shall be appointed by the Board. In the event that a party fails to appoint the arbitrator(s) within the set period, the Board shall proceed with the appointment.

(...)

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

In this case, on 9 August 2010, the appellant received the letter from the SCC to which the request for arbitration and the arbitration regulations were attached, and which invited it, in accordance with Article 5 of the SCC Regulations, to submit a response to the SCC that must contain comments on the seat of arbitration and on the plaintiffs' proposal that the presiding judge be chosen by the arbitrators appointed by the parties. To the extent that Article 5 (1) of the arbitration regulations of the SCC provides that the response must 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. Since no answer was provided by the appellant, the SCC took the initiative to extend the initial period by warning that a lack of response would not prevent the arbitration from continuing. Contrary to what the appellant claims, the Board had thus set a period during which Kazakhstan had to proceed with the appointment of its own arbitrator.

The appellant could not be unaware of that, in the absence of appointing an arbitrator within the set period, the arbitration would continue according to the rules of the SCC. However, it neither appointed an arbitrator nor requested the extension of the period as it could have done if it deemed that the period granted to it was insufficient, particularly based on the normal decision-making process of its government, the language in which the documents were worded and in light of the complexity of the case.

The appellant did not establish that the period as extended by the Board of the SCC was excessively short in relation to the arbitration proceedings conducted in accordance with the regulations of the SCC.

In the absence of a response from Kazakhstan within the extended period, the SCC validly appointed an arbitrator on behalf of Kazakhstan, in accordance with Article 13 (3) cited above.

The appellant does not explain how the appointment of Mr Lebedev as arbitrator fails to comply with the nature and circumstances of the dispute between the parties.

Given that Kazakhstan had been duly informed of the arbitration proceeding and its obligation to appoint an arbitrator, that it had been given a possibility to argue its case and that the formation of the Arbitration Tribunal took place in accordance with the conditions of the arbitration agreement and of the regulations of the arbitration institute to which reference is made in said agreement, the provisions of Article V (1) b) and d) of the New York Convention were satisfied.

- **4. On the immunity from enforcement**

The appellant's arguments

The appellant also requests the revocation, or alternatively the annulment of the order of exequatur of 30 august 2017 for having been made in violation of the immunity from enforcement enjoyed by the Republic of Kazakhstan and that it is intended to remove assets from a sovereign government through enforcement measures of its creditors and for which it is presumed are being utilised for governmental purposes.

It notes that the Statis conducted an order of attachment without presidential authorisation on 16 August 2017 on the basis Article 695 of the New Code of Civil Procedure, on the basis of the simple Arbitration Award and that in the context of this procedure, the Statis announced that its exequatur procedure was underway, so that the exequatur would thus become an element of the enforcement itself put in place by the Statis.

The respondents' arguments

According to the respondents, the appellant could not invoke immunity from enforcement in the context of this exequatur procedure.

It would appear from Article 26 of the ECT and Article 40 of the Arbitration Regulations of the Arbitration Institute that the appellant, in having ratified the ECT and undertaken by it to enforce all arbitration awards pronounced on the basis of the ECT, waived the right to any immunity from enforcement.

Alternatively, if in the unlikely event this Court admitted the application of immunity from enforcement to the Republic of Kazakhstan, this must be taken into account not at the stage of the exequatur procedure but rather in the context of an enforcement procedure, namely the order of attachment procedure.

Assessment

The foreign government that is subject to the arbitral jurisdiction agreed, through

the same, for the award to be vested with exequatur, which does not in itself constitute an act of enforcement of a nature that provokes the immunity from enforcement of the State in question. (Court of Cassation, Civil Section 1, 11 June 1991, appeal No. 90-11282, published in the bulletin).

The exequatur is not in itself an act of enforcement that may exclude immunity from enforcement of an international organisation (Court of Cassation, Civil Section 1, 14 October 2009, appeal No. 08-14.978, published in the bulletin).

The grievance drawn from immunity from enforcement must therefore be rejected.

- **5. On the contrariness to public order**

The appellant's arguments

Kazakhstan argues that the Award was fraudulently obtained, as the Statis voluntarily made false statements, produced false evidence and concealed factual elements that were fundamental to its own experts, to Kazakhstan and to the arbitral tribunal, thus improperly and fraudulently obtaining the Award that they seek to have enforced by the Luxembourg courts.

In the context of their alleged investment in Kazakhstan, the Statis, before the arbitration procedure, implemented various fraudulent schemes aimed particularly at artificially inflating the construction costs of the LPG Plant in Kazakhstan to mislead third parties on the true value of this LPG Plant and be granted considerable amounts without any basis. The misled third parties notably include (i) their own auditor, KPMG, (ii) the investors who financed the Statis activities in Kazakhstan (the Noteholders and their Joint Venture partner, Vitol, which financed the construction of the LPG Plant); the potential buyers in the context of the sale of the Statis assets in Kazakhstan organised in 2008 (the "Zenith Project") and the Kazakh tax and customs authorities.

To this end, the respondents had, in particular:

- created or had others create various companies that they presented as third party companies but which they secretly controlled (particularly the companies Perkwood (in the United Kingdom) and Azalia (a Russian company);
- made false statements to their auditors on the control and status of these companies in relation to the Statis;
- concealed the true status or even existence of these two companies across a range of documents that included (i) the consolidated financial statements of Tristan, KPM and TNG, (ii) the letters of representation made sent by the Statis 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 sent to the Kazakh customs authorities;
- artificially inflated by several tens of millions of dollars the alleged investment costs for the construction of the LPG Plant (tripling the equipment price, doubling the resale of the same equipment, fictitious accounting of

construction material, transport services and provisions, fictitious management fees and expenses, interest on the so-called loans intended to finance the construction costs of the LPG Plant, etc.);
- prepared false financial statements, particularly for Tristan, KPM and TNG, presenting companies linked to the Statis as third parties and containing the fraudulently and artificially inflated amounts;
- prepared a truncated *due diligence* report intended for potential buyers in the context of the Zenith Project, voluntarily and erroneously presenting the status of several companies linked to the Statis as third parties and independent, thus concealing the inter-company transactions that had been artificially and fraudulently inflated, and
- prepared a voluntarily manipulated Information Memorandum intended for potential buyers in the context of the Zenith Project, also containing the artificially and fraudulently inflated construction costs of the LPG Plant for the benefit of other companies controlled by the Statis.

The Statis then voluntarily misled the Arbitral Tribunal by presenting these documents (KPMG *due diligence* report relating to the Zenith Project, annual statements of the company TNG for the years 2006 to 2009, *Information Memorandum)* that they knew to be false and manipulated, in order to show considerably inflated alleged investment costs and to claim an amount of damages and interest considerably higher than the costs incurred by the Statis for the construction of the LPG Plant.

The Arbitral Tribunal concluded that the LPG Plant should be valued in the amount of US$ 199 million, by reference to the indicative offer made by KMG for the purchase of the LPG Plant. Considering that this source was relatively the best for the valuation, the tribunal necessarily indicated that it took into account other sources in its analysis, so that its decision was also influenced by the other elements invoked by the Statis concerning the construction costs.

Kazakhstan asserted that it was the responsibility of the Luxembourg court to verify if the recognition and enforcement of the judgment was such that it would harm the public order of Luxembourg, pursuant to the New York Convention, understood, meaning international public order (see Court 28 January 1999, p. 31, 95; Court 26 July 2005, p. 33, 117)

The Luxembourg jurisprudence and doctrine define international public order as being all matters that involve the essential rights of the administration of justice or the implementation of contractual obligations, or even everything that is considered essential to the established moral, political and economic order.

Furthermore, the Court of Appeal of Luxembourg, in a more recent ruling, considered that there was a violation of Luxembourg international public order *"when the award or its enforcement unacceptably clashes with the legal order of the requested State in that it violates a fundamental principle"* Court of Appeal, 17 October 2013, docket No. 37973). This could be a *"clear violation of a rule of law considered essential in the Luxembourg legal order"* or relating to "*violation of a fundamental right of this legal order"* (Court of Appeal, 15 July 2015, docket No. 40127).

In order to monitor compliance of an arbitration award with the international public order, the judge must conduct a legal and factual review of the award without, however, re-judging the case on the merits.

The doctrine and jurisprudence would not admit only that the fraud constitutes a violation of international public order.

In the context of the New York Convention, the enforcement of arbitral award should be refused on the basis of contrariness to public order *"if the party that brought it produced false evidence before the court or if the award was fraudulently obtained (…). Such a fraud nullifies the entire arbitration proceeding and constitutes a defence against the recognition of the award resulting therefrom*". The fraud constitutes grounds for refusal of exequatur in the event of *"intentional deception regarding the facts that are material for the arbitrator's decision*", including "*the use of false or fabricated documents" or "false testimonies".* (G. BORN, International Commercial Arbitration, 26 ed., Kluwer Law International, 2014, pp. 3704-3706).

The possibility of sanctioning the fraud through the public order exception in the context of the New York Convention was admitted by the Court of Appeal in the aforementioned ruling of 15 July 2015.

In accordance with the principle "*fraus omnia corrumpit"*, the doctrine deduced from a ruling of the Court of Appeal of Luxembourg of 24 November 1993 (docket No. 14983) that the fraud must allow for sanctioning an award having given effect to deception or fraudulent behaviour (J.B. Racine, International Commercial Arbitration and Public order, LGDJ, No. 893).

Even if the text of New York Convention itself does not provide descriptions of situations where there is a violation of public order, there is still a vast international consensus arguing that fraud in arbitration proceedings constitutes an autonomous basis to establish the violation of public order. The appellant refers in particular to the English, German, French and American jurisprudence.

Referring to the aforementioned decisions and doctrine, Kazakhstan claims that the fraudulent scheme put in place by the Statis constitutes a violation of public order. Thus, the Statis (i) intentionally concealed relevant elements during the arbitration proceedings, (ii) deliberately made false statements and (iii) led the Arbitral Tribunal to rely on documents, created based on artificial data, of which the Statis were well aware, and in particular:

- they repeatedly claims that they spent at least US$ 245 million for the development and construction of the LPG Plant while in reality this amount was artificially increased through transactions between related entities and for which no basis exists;
- they voluntarily concealed the existence of these transactions and intentionally concealed the fact that these transactions were executed with related entities (in particular Perkwood and Azalia);
- they declared before the Arbitral Tribunal that the offer by KMG was reliable as an indicator of the value of the LPG Plant (claiming that this offer was made by a party in full knowledge of suitable data), while they were aware

that this offer was based on fictitious elements presented to KMG;
- they did not file the Perkwood Contract and the Azalia Contract with the Arbitral Tribunal even though they had an obligation to do so in accordance with the procedural order;
- they withheld key information and made false statements on the subject of the Laren Transaction.

The appellant exhaustively elaborates in its submissions on the details of the frauds of which the Statis are accused (fraud of repurchase, fraud of management fees, fraud of fictitious exhibits, fraud regarding the construction material, fraud regarding the interest, fraud relating to the Laren Transaction, etc.).

Kazakhstan also alleges inconsistencies between the positions defended by the Statis before the Court of Appeal, on one hand, and in the foreign proceedings, on the other hand, concerning the concealment of the status of Perkwood, manipulations of construction costs of the LPG Plant through the fraud on the repurchase of material, inaccurate statements concerning the *transfer pricing,* the fraud on the management fees and the fraud with the support of fictitious exhibits, which would show that the Statis are attempting to seek a final decision of this Court on facts that they know to be incorrect.

The Statis' frauds would directly affect the entire arbitration proceeding and the Award, namely the competence of the Arbitral Tribunal, the conclusions of the Arbitral Tribunal on Kazakhstan's liability and the amount of damages and interest owed by Kazakhstan.

With regard to the impact of the fraud on the competence of the Arbitral Tribunal, the appellant claims that the frauds that taint an investment prevent the investor from accessing the arbitration, given that:

i. the protection of the foreign investment that the host State agrees to grant, by treaty, cannot be consider as being granted when the investment is made in bad faith and is tainted by fraud;
ii. the access to the investor-host State arbitration is based on an agreement established in advance by the host State (inscribed in the Treaty); however, one cannot consider that the State gave its consent to arbitrate a dispute when the investment is tainted by fraud;
iii. no State in the world would agree to grant such exorbitant protection under common law, and one that would hinder its sovereignty, to an investor and a fraudulent investment, which violates the law.

The fraudulent behaviour of the Statis contaminated their entire alleged investment in Kazakhstan and therefore prevented them from benefitting from the international protection defined by the ECT, and more specifically from access to the investor-State arbitration. The Arbitral Tribunal therefore had no jurisdiction to judge the dispute that was submitted to it by the Statis.

In any event, through the concealment of factual elements by the Statis and of fake documents produced by the Statis this proceeding could not have taken place before the Arbitral Tribunal, which would constitute a blatant violation of Kazakhstan's right to a joint and fair proceeding.

With regard to the impact of the fraud on Kazakhstan's liability, the appellant claims that, during the arbitration proceeding, the Statis produced a series of fake documents and made false statements that impacted the decision of the Arbitral Tribunal on Kazakhstan's liability and more particularly on what it considered the existence of a causal nexus between Kazakhstan's actions and the loss suffered by the Statis, particularly following the execution of the Laren Transaction.

Finally, with regard to the impact of the fraud on the amount of damages and interest, the appellant emphasises that during the arbitration proceeding, the Statis produced a whole series of fake documents and made false statements that impacted the decision of the Arbitral Tribunal on the amount of damages ultimately granted to the Statis, particularly for the LPG Plant and for the Laren Transaction.

The appellant also asserts that it was only once the Award was rendered and its exequatur procedures initiated in the United States and United Kingdom that it discovered that the Award had been fraudulently obtained; the fraud relating to the Laren Transaction was only discovered subsequent to the decisions of the Swedish courts.

The evidence and in particular the deposition of the witness Lungu are described in detail in the appellant's submissions.

Alternatively, Kazakhstan offers to prove the implementation of the fraudulent system through the hearing of witnesses, or alternatively through a decisory oath.

The respondents' arguments

The respondents argue that as the grounds for refusal of exequatur are exhaustively listed by the New York Convention, the discovery subsequent to the Arbitration Award of new evidence or the fact that the award was fraudulently obtained are not in themselves grounds that can justify the refusal of exequatur of the arbitration award in Luxembourg.

A court to which a request for recognition and enforcement is referred, by virtue of said Convention, would not be authorised to review the arbitration award on the merits. Consequently, an alleged violation would only be sanctioned if the simple reading of the award revealed this violation.

It results therefrom that it is not up to the judge hearing the case to issue an assessment regarding the foreign award's compatibility with the public order of its country, but only to verify if the recognition and enforcement of this award is such that it would violate this public order (a principle widely accepted by the Luxembourg jurisprudence and doctrine, called the "mitigated public order effect").

The Luxembourg jurisprudence adopts a restrictive approach regarding the possibility of refusing the enforcement of an arbitration award under the guise of violation of public order, being specified that this involves international public order.

The role of this Court must therefore be limited to verifying if the enforcement of the Award in Luxembourg may clash with the international public order as applied

in Luxembourg, including all matters affecting the essential rights of the administration of justice or the implementation of contractual obligations, even everything considered to be essential to the established moral, political or economic order.

It must also take into account the origin of the Award, rendered in Sweden, a member country of the European Union.

Both under the New York Convention as well as Luxembourg law on arbitration, the assessment of the Court would be limited, given that:

- the principle of "favour arbitrandum" implies that the exequatur of an arbitration award constitutes the rule and the refusal of exequatur the exception, such that it is only in grave cases or extreme situations that a Luxembourg court may refuse the exequatur of an arbitration award on the grounds of an alleged fraud and a violation of international public order;
- the judge ruling on a refusal of exequatur may under no circumstances re-examine the merits of the arbitration award and is bound by the authority of res judicata of the latter;
- a violation of international public order, as with any other grounds for refusal, must be interpreted restrictively;
- the rules on burden of proof lie with the party seeking the refusal of exequatur, in this case Kazakhstan.

In this case, there would be no violation of the most fundamental notions of the Luxembourg moral, political or economic order in the fact of admitting an arbitration award against which Kazakhstan issues only critiques relating to the amount of compensation obtained by the Statis, and all the more so because the connection between the case in question and Luxembourg is particularly tenuous, further restricting the scope of international public order.

Furthermore, the Court would be required to respect the authority of res judicata of the decision of the SVEA Court.

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

According to the respondents, the fraud invoked by the appellant, supposing it were true, would not be admissible as a violation of public order.

Primarily, they argue that Kazakhstan can no longer invoke an alleged fraud.

On the one hand, the Award, given that it is final and binding between the parties, is vested with the authority res judicata.

The argument of fraud was already raised by Kazakhstan in the context of the annulment proceeding and was definitively rejected by the SVEA Court, which decided that there was no fraud and that an alleged fraud under no circumstances had any impact – whether directly or indirectly – on the Judgment. The Supreme Court of Sweden rejected the extraordinary appeal review introduced by

Kazakhstan. The final and binding Swedish decisions rejecting the appeal for annulment of the Judgment would be recognised in Luxembourg by virtue of the Convention of 27 September 1968 on jurisdiction and enforcement of decisions in civil and commercial matters and would enjoy the authority of res judicata.

The authority of res judicata of the SVEA Court would be imposed in the present proceeding for which the SVEA Court decided on the fraud, thus precisely preventing this Court from proceeding with a new review of the fraud as grounds for refusal of exequatur.

In any event, a decision of a court of the seat rejecting the annulment of an arbitration award would be considered a solid argument in favour of the recognition and enforcement of a foreign award.

On the other hand, Kazakhstan should have invoked the alleged fraud during the arbitration proceeding given that, according to the respondents, it had knowledge of all factual elements underlying its allegations of fraud before and during arbitration.

Finally, the Statis argue that there was no fraud on their part and that Kazakhstan in any event provides no evidence of such a fraud.

they challenge the facts as presented by Kazakhstan and assert that, contrary to what Kazakhstan alleges, they are not guilty of “fraudulent manoeuvres”, and more specifically:

- they never sought to conceal the company Perkwood or the Perkwood Contract, of which Kazakhstan had perfect knowledge in any case before and during the arbitration proceeding;
- they did not purchase equipment for the LPG Plant from Perkwood at artificially inflated and fictitious prices – these prices were based on clear economic logic – and it would be incorrect to claim that “this same equipment had already been supplied, at a much lower price, by TGE in the context of the contract entered into with the latter”, as this assertion ignores the respective roles of Perkwood and TGE in the supply of equipment of the LPG plant; they also did not execute a “double resale” of the same equipment, as this equipment was never delivered and the payment was in any case reimbursed;
- they did not keep “fictitious” accounting records for the equipment for the construction of the LPG Plant;
- they did not make fictitious purchases of equipment from Perkwood, as this equipment was delivered and was necessary for the LPG Plant;
- they did not “create out of thin air” management fees and expenses, as these were legitimate, contractually defined and subject to Kazakh taxes;
- they did not fictitiously inflate the costs through fictitious interest;
- they did not keep, in a “concealed” or fictitious manner, double accounting records;
- they did not manufacture or produce fake documents during arbitration;
- it would be irrelevant in the context of this proceeding to know whether or not the Statis had “dormant statements” with the Companies House in the United Kingdom;

- they did not “deliberately mislead the Arbitral Tribunal” concerning the Indicative Offer; the Arbitral Tribunal used its own initiative based on this offer, which had been formulated in a serious manner, prior to the dispute, by KMG (a company 100% held by Kazakhstan);
- they did not commit fraud in connection with the financing of their investment.

In their submissions, the respondents detail the various points in question.

The respondents also request the rejection of investigative measures sought by Kazakhstan.

Alternatively, the respondents argue that the alleged fraud, even supposing it to be proven, would not have been the determinant cause of the Arbitration Award.

The alleged fraud would have only concerned an indicative offer made by a third party, and would cover a tiny portion of Kazakh assets of Investors, prior to the dispute arising between the parties. In addition, the allegations of fraud would only concern a portion of the amount to which Kazakhstan is sentenced: a major portion of the sentencing would in no way be related to these allegations.

The link between the alleged elements of fraud and the Award is inexistent and there is no “determinant causality”. The Swedish courts, after analysing the Award in depth after 3 years of intense annulment proceedings, ruled on a definitive, binding and not subject to appeal, that any potential fraud would have had no direct or indirect impact on the Arbitration Award.

The link that Kazakhstan would create in a completely artificial manner between an alleged fraud and the Award would in no way constitute a determinant causality. The alleged fraud would concern only an indicative offer issued by a third party and the Statis never argued that the Arbitral Tribunal had to rely on the Indicative Offer by KMG.

The existence of an alleged fraud would have only had a potential impact on the amount to which Kazakhstan was sentenced and would have in no way changed the finding made by the Arbitral Tribunal that Kazakhstan violates its obligations arising from the ECT.

The alleged fraud invoked by Kazakhstan would in reality be only a critique of the valuation method applied by the arbitrators for one of the three categories of damages awarded to the Statis. Thus, any potential fraud could have only had a potential impact on a fraction of the amount to which Kazakhstan was sentenced.

The notion of public order in the context of the exequatur

Article V-2 b) [of the New York Convention] allows a court from which the recognition or enforcement of an award is requested to refuse it if it is contrary to the public order of this country. Article V-2 b) does not define public order, however. It does it specify whether these are the principles of public order of the State of the court to which the case is referred or the principles based on the concept of international public order that must be applied in the presence of a request for recognition and enforcement based on the New York Convention. The concept of

international public order is generally stricter that the concept of national public order. The majority of government courts have adopted a stricter criterion to define the international public order, based on the norms emanating from international sources. The recommendations of the International Law Association issued in 2002 on the subject of public order are increasingly considered to reflect the best practice at the international level. The International Law Association firstly recalls that “the international effectiveness of awards rendered in the context of international commercial arbitration must be ensured, except in the presence of exceptional circumstances” (Article 1(a) of the General Provisions) and that these exceptional circumstances may consist “of the fact that the recognition or enforcement of the international arbitration award would be contrary to the international public order” (Article 1(b) of the General Provisions). Article 1 (c) of the General Provisions specifies that the expression “international public order” may designate the set of principles and rules adopted by a State which, by their nature, may fail to recognise or enforce the arbitration award rendered in the context of an international commercial arbitration when the recognition or enforcement of this judgment would lead to their violation, either based on the proceeding at the end of which the award was rendered (procedural international public order) or based on the content of the award (international public order on the merits). Article 1 (d) of the General Provisions states that international public order of a State includes: (i) the fundamental principles, relating to justice and morals, that the State wishes to protect, even when it is not directly affected; (ii) the rules intended to serve as the political, social or economic interests of the State, known as “policy laws” or “public order laws”; and (iii) the duty of the government to fulfil its obligations with other Governments or international organisations. (Guide of the International Council for Commercial Arbitration for the interpretation of the New York Convention, Chapter III, V.2., p. 115 and following).

Article V-2 b) of the New York Convention authorises the jurisdictions of a contracting State to refuse the recognition and enforcement of an award if they find that this recognition or this enforcement would be contrary to the public order of said State.

As the notion of public order was not defined by this agreement, it is incumbent on the jurisdictions of the contracting Governments to define it.

If public order is defined differently from one State to another, the jurisprudence tends to rely on the grounds of public order to refuse the recognition and enforcement of an award pursuant to Article V-2 b) in the event that it strayed from the fundamental values of a legal system. To invoke the public order exception represents a safety valve on which one can rely under exceptional circumstances where it would be impossible for a legal system to recognise and enforce a judgment without denying the very foundations on which it rests. (Guide of the secretariat of UNCITRAL on the Convention for the recognition and enforcement of foreign arbitral awards (New York, 1958) 2016 Edition, p. 252 and following).

The majority of jurisdictions confer a narrow interpretation to the notion of public order.

This same guide refers to the definition of public order given by the United States Court of Appeals, Second Circuit, according to which “[Enforcement of foreign

arbitration awards may only be refused [on the basis of public order] when this enforcement in the country of the forum is likely to violate the most fundamental values of morals and justice of the State of the forum".

The French courts have adopted a similar approach. The Court of Appeal of Paris, for example, defines the international public order as "the set of rules and values that the French legal order cannot ignore, even in international situations".

The German courts have considered that an award would violate the public order if it ignores a norm governing the foundations of German economic and public life or is irremediably opposed to the German concept of justice.

The Court of Appeal of England and Wales ruled that the public order exception defined in the New York Convention was intended for cases where "the enforcement of an arbitration award would clearly violate the general interest or the enforcement could impact the ordinary, reasonable and well-informed citizen on behalf of which the authority of the State is exercised". (ibid)

The public order exception authorises the courts of the contracting State where the recognition and enforcement are requested to review the award on the merits in order to be convinced that nothing in this award violates the fundamental values of said State.

Even if the public order exception authorises the national courts to review the award on the merits, the scope of this review is not without limits. The public order does not offer the party opposed to the recognition and enforcement the opportunity to resubmit its arguments on the merits or to invoke the erroneous nature of the decision.

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

The exceptional nature of the grounds drawn from public order explains that a higher level of proof is in principle demanded by the courts to refuse the recognition and enforcement pursuant to Article V-2 b).

If the enforcement courts admit in principle that the recognition of an award must be refused on public order grounds in particular cases, such as, for example, cases of corruption or fraud, most of the time the parties that invoke the contrariness of the award to the public order fail to substantiate their claims.

Various courts have demanded that parties alleging a fraud produce clear and convincing elements to this effect, that they demonstrate that the fraud in question could not be discovered during arbitration and that it present a material connection to the matter submitted to arbitration. In other words, in the event of fraud or bias, when the public order exception under the New York Convention is invoked, the courts often demand proof of an additional factual element, namely that the flaw invoked be such that it would have had an impact on the arbitrated matter.

This higher level of proof is in line with the exceptional nature of the public order grounds, but also with the fact that Article V-2 b) offers a simple option to national courts, without any obligation. Although these jurisdictions are be able to proceed

with an ex officio review of an award on the basis of contrariness to the public order, the fact that they assign the burden of proof to the party that opposes the recognition and enforcement, as well as demanding a higher level of proof attest to the existence of an international consensus on the favourable approach to enforcement characterising the New York Convention and the prudence with which the public order exception should be used, (ibid)

The Luxembourg doctrine considers that “Article V [of the New York Convention] allows for refusing the exequatur in the event (...) that the enforcement (but not the award itself) would be contrary to the public order. It results therefrom that it is not up to the judge hearing the case to issue an assessment regarding the foreign award's compatibility with the public order of its country, but only to verify if the recognition and enforcement of this award is such that it would violate this public order, a principle known as the “mitigated effect on public order”. Pursuant to the agreement, the public order of the State where the arbitration award is invoked is therefore not the internal public order of that country, but its international public order, which is defined as being all matters that affect the essential rights of the administration of justice or the implementation of contractual obligations, or even everything that is considered essential to the established moral, political and economic order and which, for this sole reason, must necessarily exclude the application of an award that is incompatible with the internal public order of the State where it is invoked. To be refused an exequatur, an award must clash, in its concrete results when the matter is referred to a judge, its core beliefs on the law applicable to international relations. An award based on a contract to which the consent of one of the parties was determined following fraudulent manoeuvres of the other party cannot be declared effective in the legal order of the exequatur judge. On the other hand, the New York Convention does not provide any control on how the arbitrators shall decide on the merits, subject only to compliance with international public order. Even if significant, the error of fact or law, supposing it to be committed by the arbitral tribunal, is not a cause for refusal of the exequatur of the award. That is certainly the case of the grievance made against the arbitrators of having poorly assessed, or not even having taken into consideration, certain exhibits that were submitted to them. “(J.C. Wiwinius, Private international law in the Grand Duchy of Luxembourg, 3rd ed., Section 1919)

According to Gilles Cuniberti, in the context of the control of arbitration awards, the Luxembourg jurisprudence consecrates a restrictive notion of public order.

It is now a fact, and the jurisprudence never fails to remember, that arbitration awards may not be revised on the merits, in law as well as in fact (see for example, Court 26 July 2005, docket no. 27789; Court 15 July 2015, docket No. 40127). As a result, even if significant, the arbitrator's error, in law as well as in fact, is not a case of control of awards, and therefore cannot lead to a refusal of exequatur.

Abandoning the casuistic approach fully accommodated by the French Court of Cassation, the Luxembourg jurisprudence for many years has had a positive definition of public order with regard to which it intends to control arbitration awards. The Court of Appeal indeed judges that there would be a violation of Luxembourg public order “when the award or its enforcement unacceptable clash with the legal order of the requested State as it would violate a fundamental principle” (Court, 17 October 2013, docket No. 37973; Court, 15 July 2015, docket

No. 40127). It adds that this could be a “clear violation of a rule of law considered essential in the Luxembourg legal order” or “violating a fundamental right of this legal order” (Court, 15 July 2015, docket No. 40127).

(...)

This definition reflects the restrictive nature of the public order exception and rightly insists on the rules that alone may legitimately constitute the international public order. These are, on one hand, fundamental rights. Reference is made here to the rights recognised as fundamental either in national law (Constitution) or in European or international law (European Convention on the Rights of Man, in particular). These are, on the other hand, rules and principles that, without necessarily being elevated to the rank of fundamental rights, constitute essential rules or fundamental principles of the Luxembourg legal order. (G. Cuniberti: The control of arbitration awards with regard to the public order under Luxembourg law, Luxembourg Courts Journal 2016/3)

In a ruling of 28 January 1999 (Pas. 1999-2001/1, pp. 95-103), the Court of Appeal upheld that “*Through the New York Convention of 10 June 1958, Luxembourg has committed to recognising arbitration agreements and cannot refuse the exequatur of arbitration awards rendered following arbitration agreements except for the reasons exhaustively listed in Article V of the Convention. In order for the exequatur judge to refuse for one of these reasons, the party against which the enforcement is pursued must, in advance, provide proof of the existence of this reason (Article V, 1). The plaintiff has therefore provided no evidence. Ex officio refusal by the judge can only occur for contrariness of the award with the public order or when he finds that the subject matter of the dispute was not eligible, according to its law, to be submitted to arbitration (Article V, 2). The control of the requested judge must essentially concern, firstly, the issues of whether the awards in question were rendered at the end of a proceeding that sufficiently protected the rights of the defence and then, if the law applied to the merits of the awards is compatible with its international public order. Supplementary grounds for refusal of recognition and enforcement, which would lead to either a re-examination of the merits of the case or to the establishment of grounds of nullity cited in Article 1023 of the Code of Civil Procedure, cannot be restored under the guise of public order. As it involves giving effect in Luxembourg to the laws acquired abroad, the public order intervenes only through its mitigated effect and is found to be less demanding than when it involve the acquisition of these same rights in Luxembourg. The Convention under no circumstances allows the judge hearing the request for exequatur to control the manner in which the arbitrators ruled on the merits, under the sole reservation of compliance with the international public order. Even if significant, the error of fact or law is not a cause for refusal of exequatur of the award.”*

In a ruling of 26 July 2005 (Pas. 33, 117), the Court recalled that “*Through the New York Convention of 10 June 1958, Luxembourg has committed to recognising arbitration agreements and cannot refuse the exequatur of arbitration awards rendered following arbitration agreements except for the reasons exhaustively listed in Article V of the Convention. The grounds for refusal, which must be invoked by the party opposing the recognition or enforcement are, in addition to those concerning the annulment or the suspension of the award in the State of*

origin (par. 1e), the invalidity of the arbitration agreement (par.1a), violation of adversarial proceedings (par.1b), exceeding the terms of the arbitration agreement (par.1c) as well as the irregularity affecting the composition of the arbitral tribunal or the arbitral proceedings as agreed (par.1d), to which must also be added those that may even be raised ex officio and that are of the impossibility of settlement by arbitration of the dispute (par.2a) and the contrariness of the award to international public order (par.2,b).

Regarding the contrariness of the foreign arbitration award with the international public order, the control of the requested judge must essentially concern, firstly, the issue of whether the award in question was rendered at the end of a proceeding that sufficiently protected the rights of the defence and then, if the law applied to the merits of the award is compatible with its international public order, especially based on the global convergence of the laws of two contracting Governments, there is little risk that Belgian law applied by the arbitrator clashes with the principles of public order of the requested judge. The idea of restoring, under the guise of public order, supplementary grounds for refusal of recognition and enforcement, which would lead to either a re-examination of the merits of the case or to the establishment of grounds of nullity cited in Article 1244 of the Code of Civil Procedure, must in any case be rejected. As it is to give effect to the rights acquired abroad, public order is therefore by its effect mitigated, and is less stringent if it was acquiring such same rights in Luxembourg. The New York Convention under no circumstances allows the judge hearing the request for exequatur to control the manner in which the arbitrators rule on the merits, under the sole reservation of public order. Even if significant, the error of fact or law, to suppose it were committee by the arbitral tribunal, is not a cause for refusal of exequatur."

The exclusion of enforcement through the use of public order is only justified in the case of a violation of a fundamental principle of the legal order of the requested State, through the violation of an essential rule of law or a fundamental right in the legal order of this State. (Court 17 October 2013, number 37973 of the docket)

The clause relating to public order listed in Article V-2 b of the New York Convention does not allow a review of the arbitration award on the merits and can only apply where the award or its enforcement unacceptably clash with the legal order of the requested State in which a fundamental principle is violated. The enforcement of a judgment or an arbitration award that, according to the argumentation of the party opposing it, was obtained fraudulently, without this fraud resulting from a decision of the court or board of competent arbitrators, does not constitute a clear violation of a rule of law considered essential in the legal order of Luxembourg and does not violate a fundamental right of this legal order. (Court 15 July 2015, number 40127 of the docket)

Assessment

Considering the above developments, the Court considers that, for there to be contrariness to the public order, the Award must have been obtained through a clear and determinant fraud.

The burden of proof lies with the party that opposes the exequatur by invoking the fraud.

The allegations advanced by the appellant, even supposing them to be proven, and the fact that KPMG withdrew its reports concerning the financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not such that they would constitute a fraud tainting the same basis for the respondents' investment in Kazakhstan, as this investment began well before the manoeuvres criticised by the appellant. They are therefore not such that they would have an impact on the competence of the Arbitral Tribunal.

Under the terms of the Award (Section 1095), the Arbitral Tribunal concluded that Kazakhstan's measures, taken against one another in context and compared to the treatment of the Statis investments before the order of the President of the Republic of 14/16 October 2008, would constitute a series of harassment measures coordinated by numerous Kazakh institutions. These measures must be considered as a violation of the obligation to treat investors fairly and equitably, in accordance with Art. 10(1) of the ECT.

The Tribunal set the amount of damages and interest at a total of US$ 508,130.00 [sic], of which US$ 277,800,000.00 [sic] was for the Borankol and Tolkyn fields, US$ 31,330,000.00 was for the properties of Contract 302 and US$ 199,000,000.00 was for the LPG Plant, and it deducted three debts from these.

The Laren debt was not deducted from the damages and interest granted by the Court, which considered that it was caused by Kazakhstan's conduct – which the Tribunal considered to be in violation of the ECT – and that it was repaid.

The Award itself, in which it declares a sentence of a sum of money, is not contrary to the public order.

In light of the detailed information on the grounds that led the Tribunal to consider Kazakhstan liable, the appellant does not justify that the alleged fraud had an impact on the decision concerning its liability.

As it concerns the Laren Transaction, the Award (Sections 1415 and 1416) states that "*the Parties agree, as does the Tribunal, that the Petitioners were only able to face the storm of the 2009 Tété thanks to obtaining financing through the Laren loan. The Parties agree, as does the Tribunal, that the terms of the Laren loan were disastrous for the Petitioners. In addition, the Parties agree, as does the Tribunal, that if the Petitioners had obtained financing with Credit Suisse in December 2008, they would not have needed to rely on other lenders in June 2009. The Parties contest the fact that the Defendant's actions pushed the Petitioners to take out the Laren loan. The Tribunal considers that the Laren loan, with its onerous terms, was taken out in June 2009, as KPM and TNG had to secure these funds and that the Defendant's actions prevented them from doing so sooner. In June 2009, ordinary lenders would not have granted a loan to these companies under commercial terms. Although the Petitioners negotiated as much as they could, the cumulative effect of the avalanche of inspections and the public revelation, made in December 2008, of allegations of fraud and falsification committed in connection with the transfer of Terra Raf, as mentioned above, resulted in significant downgrades by the ratings agencies Moody's and Fitch. While the global economic crisis affected these companies at the end of 2008 and*

the beginning of 2009, the concerted and aggressive actions of the State, including the inspections, criminal charges and seizure of assets, even before the M. Cornegruta trial in August and in December 2009, forced the Petitioners to accept the "appalling" Laren loan".

It follows that, contrary to the appellant's allegations, the arbitrators had taken into consideration that TNG and KPM were aware of financial difficulties at the end of 2008, prior to the actions for which Kazakhstan is reproached.

The principle of Kazakhstan's liability and the principle of indemnification of the Statis are not, therefore, called into question by the fraud alleged by the appellant, which concerns, at most, a portion of the amount of damages and interest.

To set the amount of damages relating to the LPG Plant, the Arbitral Tribunal considered that it did not have to evaluate the reports of the respective experts as well as the very different results they reached, but that the contemporary offers made for the LPG Plant by third parties after the Statis efforts to sell the LPG Plant, in turn before and after 14 October 2008, represented the best valuation source for the valuation date accepted by the Tribunal.

It stated that "*The potential buyers made an offer for the plant, not as a value of recovery, but rather for a potential operation. This fact is reflected in the uncontested indicative offers submitted by the interested buyers in 2008, which estimated the LPG Plant at US$ 150 million on average.*

The tribunal considers as particularly relevant the fact that an offer of US$ 199 million was made at that time by KMG, a company held by the State, 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 a valuation of the LPG Plant during the relevant period of the valuation date accepted by the tribunal. Consequently, this is the amount of damages that the court accepts in this context." (Section 1746 and 1747)

In its request for annulment of the Award before the SVEA Court, Kazakhstan had presented arguments of fraud that, for the most part, aligned with those currently invoked.

Thus, the SVEA Court summarised Kazakhstan's arguments in these terms:

"Firstly, the construction of an LPG Plant was enveloped in a vast, fraudulent and sophisticated arrangement, which constitutes an act of corruption on the part of the Investors. The purpose of the structure was, through fake contracts and false transactions, to create a significant fictitious value for the LPG Plant. Second, the Investors committed procedural fraud by presenting false evidence in the form of witness statements, testimony and expert opinions concerning the fraudulent arrangement and therefore the value of the LPG Plant, which misled Kazakhstan, the SCC and the arbitral tribunal. The Investors also deliberately hid information concerning the investment and valuation of the LPG Plant in order to conceal the fraudulent arrangement from Kazakhstan, the SCC and the arbitral tribunal. Thirdly, the Investors' misleading approach impacted the result of the deal as it served as a basis for the indicative offer of KazMunaiGas National Company

(KMG) and therefore the calculation of damages-interest by the arbitral tribunal. In addition, the false evidence affected the general evaluation of the testimony of witnesses, the witness statements, expert reports and actions of the Investors in general, which in turn affected the issue of liability and the valuation of the amount of damages and interest.

(...)

The evaluation by the arbitral tribunal of the value of the LPG Plant and, therefore, the damages and interest granted to the Investors, was based on the indicative offer, such that the fraudulent and misleading arrangement of the Investors directly impacted the outcome of the case."

The SVEA Court rejected these arguments by holding that:

"As the Court described above, the scope of the public order provision is very narrow and the legislature has also clearly been led to not introduce the provision in the Arbitration Law corresponding to the case review mechanism. In the opinion of the Court, it should therefore not be a question of annulling an award only because of false evidence or false statements presented when it is not clear that they were directly determinant of the result (…)

(...) There should be no question, in the opinion of the Court, to allow an indirect influence on the arbitral tribunal such that the award can be considered invalid, otherwise when it is clear that this indirect influence had a decisive impact on the outcome of the case.

Given that the tribunal based its decision on the indicative offer, the evidence invoked by the Investors in the form of oral testimony, witness statements and expert reports concerning the amount of the investment cost – evidence that Kazakhstan declared to be false – had no direct impact on the result. This fact only means that this evidence on its own, even if proven to be false, cannot constitute sufficient grounds, according to the Court, to consider the award invalid. Nor is it clear, according to the Court, that this evidence, through an indirect influence on the court, had decisive importance for the outcome of the case.

Regarding whether the indicative offer on its own constituted false evidence, it is not disputed that KMG, before the arbitration was initiated, had submitted an offer of US$ 199 million for the LPG Plant. The indicative offer on its own should therefore not be considered false evidence, even if the potentially incorrect details of the amount invested in the LPG Plant through the annual reports of Tristan Oil, 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 are therefore not directly tied to the decision of the tribunal concerning the value of the LPG Plant. With this in mind, the reference made by the Investors to the indicative offer did not constitute an invocation of false evidence.

Finally, as it concerns Kazakhstan's claim according to which, in the arbitration, the Investors concealed from the tribunal and from Kazakhstan certain information that could have impacted the outcome of the case, the Court observes that a party in a case subject to extrajudicial regulations such as arbitration cannot be obligated

to provide the counterparty with information harmful to its own case. It is not possible to consider that the award has no validity for this reason, particularly in light of the very narrow scope of the public order rule."

The SVEA Court inferred that Kazakhstan's claims concerning the fraudulent arrangement, the false evidence and the misleading information presented during arbitration do not constitute grounds for annulment of the Award, in accordance with the provisions of Swedish arbitration law.

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

Contrary to the respondents' arguments, the decisions of the Swedish courts, hearing the appeal for annulment of the Award and reviewing the validity of the Award in relation to the Swedish public order, do not prevent the Court of Appeal, hearing a request for exequatur, to assess, with regard to the arguments of fraud invoked, a potential contrariness of the Award with the international public order.

The control exercised by the exequatur judge, exclusive of any power of review of the arbitration decision on the merits, is limited, however, and has the sole purpose of verifying if the recognition or enforcement of the Award effectively and concretely violates the international public order.

The Court cannot proceed, under the guise of the grounds drawn from the contrariness to the public order based on frauds in the arbitration award, with a re-examination of the merits of the case in light of the elements invoked by the appellant.

The fraud in the arbitration award assumes that fake documents were produced, that deceptive testimonies were collected or that exhibits involving the resolution of the dispute were fraudulently concealed from the arbitrators, such that their decision was surprised.

The party opposing the exequatur by invoking a contrariness of the arbitration award to the public order must not only prove the alleged fraud through clear and convincing evidence and demonstrate that the fraud in question could not be discovered during arbitration, but also that the "fraudulent manoeuvres" had an impact on the arbitrators' decision.

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

Insofar as the fraud should be clear, it is not the responsibility of the Court, hearing the request for exequatur, to proceed with investigative measures to verify the existence of the alleged fraud.

It is therefore necessary to reject both the offer of evidence by witnesses as well as through decisory oath formulated by the appellant.

Even assuming it to be proven, the alleged fraud could not have impacted the arbitrators' decision regarding Kazakhstan's liability, but only concerned a portion

of the damages and interest in question, in this case the damages and interest relating to the LPG Plant.

The Arbitral Tribunal, which was in possession of numerous exhibits, expert reports and testimonies, decided to base its decision, to calculate the damages and interest relating to the LPG Plant, on the indicative offer of KMG, which was not specifically invoked by the Statis in support of their request. However, the arbitrators were free to choose the elements they deemed relevant for the valuation of the LPG Plant and they were able to verify the accuracy and assess the relevance of the exhibits and information submitted to them.

Likewise, the parties had the opportunity to inspect/have others inspect and discuss all exhibits appearing in the file during the arbitration proceeding and to contribute their own documents, expert reports and testimonies, such that the proceeding sufficiently protected the rights of the defence.

The indicative offer of KMG on which the arbitrators essentially based their valuation of the damages relating to the LPG Plant is not a fake exhibit as such, but it was actually made by KMG – a third party in relation to the Statis – well before the start of the arbitration proceeding.

Both the arguments of fraud already previously alleged before the SVEA Court as well as the new evidence invoked before this Court, in addition to the new element currently invoked relating to the KPMG letter, are intended to establish that the indicative offer of KMG is based on false elements and cannot therefore be used by the arbitrators to value the damages and interest for the LPG Plant.

However, on the one hand, the costs of the Plant - which, according to the appellant, were artificially inflated by the respondents - were but one instrument among others taken into consideration by KMG for the submission of the offer.

On the other hand, the arbitrators could not be unaware that, as this was only an indicative offer, it could in no way reflect the exact value of the Plant. They thus considered that "*the potential buyers made an offer for the plant, not as a value of recovery, but rather for a potential operation".*

Therefore, even to admit that KMG, by calculating the amount of the indicative offer, could have taken into account potentially incorrect details of the amount invested in the LPG Plant through the annual reports of Tristan Oil, KPM and TNG or *the Information Memorandum,* the allegedly false information contained in said documents, in testimonies or in the Statis statements were not determinant for the decision of the Arbitral Tribunal concerning the value of the LPG Plant.

As it concerns the Laren Transaction, the appellant does not establish, in light of the respondents' objections, either the fraud on the grounds of manifest, clear and convincing evidence, or that it could not have discovered the alleged fraud at the time of the arbitration or, in any case, prior to the decision of the SVEA Court.

The appellant has not provided evidence that the Award was made on the basis of false statements and exhibits, or a clearly fraudulent scheme of the Statis to obtain this decision.

The allegations of fraud with regard to the Statis, even if they were proven, are thus irrelevant for the Award.

The fact that the majority of the arguments relating to the fraud currently advanced were rejected by the Swedish courts and that Sweden as well as Luxembourg are members of the European Union further reinforces the Court's opinion that the enforcement of the Award does not unacceptably clash with the Luxembourg public order.

In light of the developments above, it is not established that the Arbitration Award and the corrective award or their enforcement constitute a clear violation of a rule of law considered essential in the Luxembourg legal order and violate a fundamental right of this legal order.

The argument drawn from the contrariness of the public order pursuant to Article V-2 b) of the New York Convention must therefore be rejected.

As a result, there is no reason to revoke the closure order, given that the fact that KPMG withdrew all audit reports it prepared on behalf of the companies KPM and TNG is irrelevant and does not constitute a serious cause pursuant to Article 225 of the New Code of Civil Procedure.

- **<u>On the stay of proceedings</u>**

<u>The appellant's arguments</u>

Kazakhstan seeks, on the basis of Article 3 of the Code of Criminal Procedure, the staying of a ruling based on the civil complaint it filed on 27 May 2019 with the investigative judge against the Statis for

- forgery and use of forged documents, respectively attempted forger and use of forged documents;
- obtaining a judgment under false pretences, respectively attempted obtainment of a judgment under false pretences;
- money laundering, respectively attempted money laundering.

The attempted enforcement of the title established though fraud by the Luxembourg courts would constitute an extension of the offence in the territory of the Grand Duchy of Luxembourg, such that the criminal jurisdiction would exist in Luxembourg.

There would be identical parties, subject matter and cause between the two actions, criminal and civil, and the public action would clearly have an impact on the civil action in several regards.

In the context of the proceedings in Luxembourg, the Statis produced a range of documents, in particular the fake KPMG "*due diligence*" report during the Zenith project relating to the sale of TNG and the LPG Plant, the fake annual statements of TNG (and since 2007, the fake combined financial statements of Tristan, KPM and TNG) for the years 2006-2009 and the fake *Information Memorandum* utilised

during the Zenith Project relating to the attempted sale of TNG in 2008.

If the criminal courts decided that the exhibits filed by the Statis in the arbitration proceeding as well as in the exequatur proceeding are fake, this would clearly prevent the recognition and enforcement of the Arbitration Award in Luxembourg.

The respondents' arguments

The respondents deem that the interest of a good administration of justice would require not considering this dilatory manoeuvre to continue the exequatur proceeding until its conclusion.

The exequatur judge is not the judge of the civil action pursuant to Article 3 of the Code of Criminal Procedure.

The appeal filed before the Court by Kazakhstan is not for the purpose of compensating a potential loss that was caused by a criminal offence.

The complaint filed on 27 May 2019 by Kazakhstan could not have had any impact on the exequatur proceeding of the Arbitration Award and would have had no risk of contrariness of decisions.

The complaint had the nature of a dilatory manoeuvre.

Assessment

In the context of its criminal complaint, Kazakhstan argues in particular that several documents produced by the Statis in arbitration are fake, and in particular the financial statements of Tristan, KPM and TNG, *the Information Memorandum* and the KPMG *Due Diligence Report.* The Statis presented false evidence to the Arbitral Tribunal for the purpose of thus deliberately misleading the arbitrators to obtain a title against Kazakhstan. The documents and information concealed by the Statis would have had a decisive impact on the Award. The Arbitral Tribunal would never had upheld the Statis requests if it had been aware of their criminal actions at the time. The Statis actions fell under criminal law. The Statis knowingly and fraudulently misled the Arbitral Tribunal concerning the construction costs of the LPG Plant for the purpose of having Kazakhstan be sentenced to pay the damages and interest for losses that were never actually incurred. These damages were calculated based on fictitious costs and investments, or alternatively intentionally inflated for a fraudulent purpose. They were also documented through fictitious contracts and fake exhibits, as well as through expert reports further constituting intellectual fakes, to the extent that the latter were prepared based on these same fake exhibits and fictitious contracts. The Award is therefore the product of offences of swindling, forgery and use of forged documents and their use by the Statis in the context of the exequatur proceeding, constituting fraudulent manoeuvres pursuant to Article 496 of the Criminal Code. The use of the Award by the Statis in the context of the order of attachment proceedings constitutes the offence of money laundering.

The application of the rule consecrated by Article 3, paragraph 2 of the Code of Criminal Procedure and which is intended to prevent the civil judge from

contracting the decision to be made on the public action of whose authority he may avail himself, is subject to two conditions: 1. That the action arises from the same fact that serves *as a* basis for the public action; and 2. That the public action was truly initiated before or during the pursuit of the civil action, the latter condition being satisfied in the case at hand.

As it concerns the condition of the identical nature of the fact giving rise to the two actions, it is not necessary for both to present the same cause and the same subject matter; however, there must be a common issue that the civil court cannot settle without at the same time finding the offence committed and therefore in contradiction with the criminal court. (Court 24 November 1993, no. 14983 of the docket)

In this case, Kazakhstan denounces at the basis of the criminal complaint the same facts as those alleged as fraudulent manoeuvres of the Statis to object to the request for exequatur.

If it is accepted that the exequatur judge is a civil judge pursuant to Article 3 of the Code of Criminal Procedure, the request to stay the ruling can only be accepted if the facts denounced as constituting the offence had a direct impact on the grounds for refusal of the exequatur and if the criminal decision to be taken is likely to impact the civil decision.

However, it was found above that the alleged fraud and, therefore, the facts denounced as constituting the offence, had no impact on the exequatur.

Consequently, there is no reason to stay the ruling.

On the procedural indemnities

With regard to the fate reserved for its appeal, Kazakhstan's request to obtain a procedural indemnity must be dismissed.

In the absence by the respondents to justify the iniquity required by Article 240 of the New Code of Civil Procedure, there is no basis to grant them a procedural indemnity.

FOR THESE REASONS

the Court of Appeal, eighth chamber, sitting on a civil and exequatur matter, jointly ruling, on the report of the magistrate of the Court of First Instance,

rejects the request for revocation of the closure order,

declares the appeal admissible,

removes from the proceedings paragraphs 2, 7 section 1 and 125 section 5 of the respondents' summary submissions, as well as their exhibit no. 64,

dismissing all other requests, submissions, arguments and offers of evidence,

declares the appeal unfounded,

declares the parties' respective requests filed on the basis of Article 240 of the New Code of Civil Procedure unfounded,

sentences the appellant to pay the fees and expenses.

This ruling was read at the public hearing indicated above by Lotty PRUSSEN, Presiding Judge of the Chamber, in the presence of the clerk Alain BERNARD.