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JUG- JGC

No. [hw:] *286*

French-language Court of First Instance of Brussels, Civil Court

Judgement

4th chamber
of civil cases

presented on
do not register

Final Adversarial Judgement

1 summons
1 petition
1 order
7 submissions

IN THE CASE OF:

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

Claimant,

Represented by **Maître Nuyts, Arnaud and Maître Hardy, Bruno,** lawyers, with chambers situated at 1000 Brussels, boulevard de l'Empereur, 3;
Email: a.nuyts@liedekerke.com; b.hardy@liedekerke.com;

AGAINST:

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

Having elected domicile at the offices of their bailiff, Maître Sacré, Marc, located at 1081 Koekelberg, avenue de Jette, 32, in their writ of service of 2 January 2018 of the Enforcement Order handed down;

Defendants,

Represented by **Maître JACMAIN Sophie, Maître VAN DROOGHENBROECK, Jean-François and Maître BRIJS, Stan,** lawyers, with chambers situated at 1000 Brussels, chaussée de la Hulpe, 120; Email: sophie.jacmain@nautadutilh.com; jean-francois.vandrooghenbroeck@nautadutilh.com; stan.brijs@nautadutilh.com;

** ** **

In this case, deliberated on 15 November 2019, the court pronounces the following judgement:
Pursuant to the exhibits of the proceedings and in particular:

- the summons for third-party opposition against an enforcement order served on 2 February 2018;
- the order on the basis of Article 747 §1 of the Judicial Code pronounced on 11 July 2018;
- the petition based on an exhibit or a new fact filed at the registry on 9 April 2019;
- the order based on Article 748 of the Judicial Code pronounced on 2 May 2019;
- the principal submissions and the summary submissions and the third additional and summary submissions after formal continuation of the case for the claimant filed at the registry on 30 November 2018, 29 March 2019 and 12 August 2019;
- the initial submissions, the second submissions and the summary submissions and the summary submissions after formal continuation for the defendants filed at the registry on 28 September 2018, 31 January 2019, 17 April 2019 and 28 October 2019;
- the exhibit files of the parties;

Having heard the parties' counsels in their statements and evidence at the public hearings of 9 and 10 May 2019 and 13, 14 and 15 November 2019;

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I. STATEMENT OF FACTS

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

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

Before being purchased by the Statis, KPM and TNG had been authorised by Kazakhstan to explore and develop various oil fields and gas deposits in the country, under various land use contracts.

In 2006, TNG started construction work on a liquid petroleum gas plant (the "LPG Plant").

In 2007, a first dispute arose between the Statis and Kazakhstan, on the existence of a pre-emptive right of the company TNG to the benefit of Kazakhstan.

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

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

On 29 August 2008, the audit firm KPMG issued a due diligence report on the proposed sale by the Statis.

Still in August 2008, the companies Meridian Petroleum and Total submitted a non-binding offer without commitment for the purchase of the company TNG in charge of the LPG Plant.

On 27 September 2008, the company KazMunaiGas (hereinafter referred to as “KMG”), owned 100% by Kazakhstan, also submitted a non-binding offer.

This non-binding offer stated, inter alia, that “*in making our non-binding offer, we made use of the information contained in the Information Memorandum and some publicly available information. Our assessment is subject to confirmation of the reality of this information and these assumptions during the second phase through review of documents and meetings to be held*” (exhibit 8.13, p.3, Kazakhstan’s file, free translation not contested). This non-binding offer also stated that without complete information, the assessment was the result of the weighted average of results obtained by comparative method and by cost method.

In October 2008, Kazakhstan initiated a financial investigation to determine whether the companies KPM and TNG indeed comply with the laws on exportation taxes and had the required licences for the operation.

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

In 2009, Kazakhstan wanted to retake possession of the assets and rights of the company TNG, in particular, by cancelling Terra Raf’s authorisation to buy out TNG.

By letter dated 18 March 2009, the Statis made two proposals to Kazakhstan aimed at resolving the dispute between the parties. This letter also stated that in case of refusal by Kazakhstan, the Statis would bring the dispute before the Stockholm Chamber of Commerce (hereinafter referred to as the “SCC”) pursuant to the ECT (exhibit 1.15, Statis’ file).

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

On 16 June 2009, the Statis took out a loan with a group of venture capital investors. The transaction was called the "Laren transaction".

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

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

On 26 July 2010, the Statis filed a request for arbitration with the SCC pursuant to Article 26 of the ECT. In their request for arbitration, they in particular requested that the tribunal should be made up of three arbitrators and that the SCC, in accordance with Article 13 (3) of its rules, should appoint an arbitrator if Kazakhstan does not appoint one.

In a letter dated 5 August 2010, the SCC sent the Statis' request to Kazakhstan. By referring specifically to Article 5 of the rules of arbitration of the SCC's Arbitration Institute, the letter also invited Kazakhstan to send its response by 26 August 2010 at the latest. The letter further specified that the expected response must contain comments on the seat of arbitration and the proposal by the Statis for the appointed arbitrators to appoint the president of the arbitral tribunal (exhibit 1.17, Statis' file).

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

On 27 August 2010, the SCC sent a letter of reminder to Kazakhstan requesting a response by 10 September 2010 at the latest and stating that a lack of a response would not hinder the arbitral proceedings. This letter was received by Kazakhstan on 31 August 2010 (exhibit 1.19, Statis' file).

On 13 September 2010, the Statis filed a motion for appointment of an arbitrator by default for Kazakhstan, in implementation of Article 13 (3) of the rules of arbitration of the SCC.

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

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

In a letter from its counsel on 2 December 2010, Kazakhstan challenged the appointed of Professor Lebedev maintaining that the response time that it was granted was unreasonable and that such appointment had been made with unjustified haste.

The Statis contested Kazakhstan's objection in a letter dated 6 December 2010.

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

On 19 December 2013, the arbitral tribunal handed down an award in which it ordered Kazakhstan to pay the Statis the amount of USD 497,685,101, plus any costs and interest.

On the substance, the arbitral tribunal described the behaviour of the Kazakh authorities as of October 2018 as "*measures of harassment (…) considered a violation of the obligation to treat the investors in a fair and equitable manner, according to Art. 10(1) of the ECT*" (§ 1095). It continued by considering that "*the conduct of* (Kazakhstan) *clearly had a tremendous impact on the investment's value and, therefore, on the quantum of damages*" (§ 1502).

The arbitral tribunal then handed down a decision on the damage suffered by the Statis following what it described as "*collaborative and hostile action by the State, including the inspections, criminal accusations and seizure of assets*" carried out by Kazakhstan. The parties submitted various items before the arbitral tribunal to support their assessment of their loss. To this end, the Statis in particular filed the non-binding offer made in September 2008 by KMG.

Regarding the assessment of the loss suffered by the Statis, the parties disagreed before the arbitral tribunal on the following points:

- taking into account certain debts for the assessment of the enterprise value of KPM and TNG;
- the reduction of development actions at the Borankol and Tolkyn fields;
- the loss of a chance to discover a new viable part of the Interoil reef in case of extension of Contract 302 until March 2011;
- the value of the LPG Plant;
- the existence of non-pecuniary damage;
- the existence of tax receivables to the benefit of Kazakhstan to be offset against the damages awarded to it;
- the impact of the aborted transaction with the company Cliffson.

Regarding the consideration of debts, the arbitral tribunal considered that "*only the debts governed by the Reachcom loan agreement, the Limozen loan agreement and the Reachcom debt acquisition should be deducted from the damages to be awarded*" (§ 1542). It stated that "*the Laren debt was caused by the Defendant's conduct that this Tribunal now considers to be a breach of the ECT. In addition, it was repaid, as Mr Lungu can attest to (…). The Tribunal sees no reason why it* (meaning the Laren debt) *should be deducted from the damages awarded*" (§ 1540). The arbitral tribunal also found that the Tristan obligations should also not be deducted from the damages allocated (§ 1771).

The Tribunal held an amount of USD 277.8 million in respect of damages for the loss of value of the assets due to reduction in the aforementioned development actions (§§ 1632 to 1625).

Concerning the loss of future profits due to prolonged exploration of the Interoil reef, the arbitral tribunal considered that the Statis did not provide evidence of their damage or of its causal link (§ 1691).

As for the quantum regarding the LPG Plant, the arbitral tribunal considered that:

"1746. Regarding the amount for damage caused by the Defendant's action, the Tribunal noted the various exhaustive arguments submitted by the Parties based on the reports of their respective experts. However, the Tribunal feels that it did not have to assess these reports as well as the very different results to which they came. In the opinion of the Tribunal, the contemporary bids that were made for the LPG plant by third parties after the efforts of the Claimants to sell the LPG factory, both before and after 14 October 2008, represent the best source of relative assessment for the assessment date accepted by the Tribunal. 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 USD 150 million on average. In this context, the Tribunal is not convinced by the Defendant's argument according to which these offers did not reflect the expected price that bidders were willing to pay, but that they were only strategic offers to access the data room. In this context, the Tribunal assigns a limited probative value to the testimony of the Defendant's witnesses for KNOC and Total E&P, given that these foreign companies remain active investors in Kazakhstan and that they therefore wish, and for understandable reasons, to maintain a good relationship with the government of this country.

1747. On the other hand, the Tribunal considers as particularly relevant the fact that an offer of USD 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.

1748. Therefore, this is the amount of damages that the Tribunal accepts in this context" (arbitral award of 19 December 2013, free translation of the Statis, not contested).

The arbitral tribunal therefore granted the Statis compensation set at USD 508,130,000, i.e.:

- USD 277,800,000: amount associated with the Borankol and Tolkyn fields (combined asset value)
- USD 31,330,000: amount associated with the properties of Contract 302 (investment expenditure incurred by the Statis)
- USD 199,000,000: amount associated with the LPG Plant.

The arbitral tribunal deducted from this amount certain debts in the amount of USD 10,444,899.

On 17 January 2014, the arbitral tribunal handed down an amending award on the basis of Article 41 of the rules of arbitration of the SCC and Article 32 of the Swedish law on arbitration. This amending award mainly concerned the costs of the arbitration procedure.

Kazakhstan has applied for annulment of these awards before the Court of Appeal of Svea (Sweden).

By a decision handed down on 9 December 2016, the Court of Appeal of Svea rejected the request for cancellation of the arbitral awards of 19 December 2013 and 17 January 2014.

The Statis, for their part, lodged applications for the enforcement of the above-mentioned awards in several countries. They have thus obtained the enforcement:

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

They also introduced an application for enforcement in the Netherlands on 26 September 2017, the outcome of which has not currently been decided.

Kazakhstan formed an objection or appeal against each of the foreign decisions granting enforcement of the disputed awards. However, none of Kazakhstan's appeals have been successful to date, either because they were rejected, or because they are still in progress. The opposition procedure in Great Britain has meanwhile been closed by the Statis' withdrawal of their application for enforcement.

By summons served on 2 February 2018, Kazakhstan filed objections against the order of 11 December 2017 before this court. It involves this case.

II. PURPOSE OF THE REQUEST

Kazakhstan requested the court to reverse the enforcement order pronounced on 11 December 2017.

The Statis conclude on the rejection of the request.

Each of the parties requests that the other be ordered to pay the expense, including procedural indemnity assessed on either side at €36,000, i.e. the maximum provided for a case that cannot be assessed in monetary terms.

III. DISCUSSION

In support of its request to cancel the enforcement order, Kazakhstan puts forward three arguments:

1. the incompetence of the Court of First Instance;
2. the Statis' obtaining of the arbitral award by means of fraud;
3. the unlawfulness of the arbitral proceeding, and more specifically the incompetence of the arbitral tribunal and the violation of Kazakhstan's rights of defence.

1. As for the first argument based on the incompetence of the Court of First Instance

Kazakhstan considers that the Court of First Instance was not competent to rule on the application for enforcement of an arbitral award on which the law of 24 June 2013 amending part six of the Judicial Code relating to arbitration was not applicable.

Kazakhstan hence maintains that the request for enforcement should have been brought before the President of the Court of First Instance, and not before the court of first instance, pursuant to former Article 1719 § 1 of the Judicial Code.

Article 3 of the Judicial Code provides that:

> *"The laws of judicial organisation, competence and procedure are applicable to on-going trials without, however, withdrawing the case from the court which, to its degree, had been validly referred to and apart from the exception provided for by law"*

This article therefore expressly provides for the possibility for the lawmaker to derogate from the principle of immediate applicability of procedural laws. To do this, it will have recourse to one or more so-called transitional provisions. It is furthermore established that such exemption shall be strictly interpreted.

The aforementioned Law of 24 June 2013 is a procedural law that came into force on 1 September 2013, and applies, in principle, to on-going trials in conformity with Article 3 of the Judicial Code.

However, the lawmaker of 2013 provided for a derogatory regime defined in Article 59 of the Law of 24 June 2013 in these terms:

> *"this Law applies to arbitrations that begin in accordance with Article 34 following the date of entry into force of this Law.*
> *The sixth part of the Judicial Code, as it was drafted before the entry into force of this Law, remains applicable to the arbitrations that started prior to the entry into force of this Law.*
> *This Law applies in the case of actions that are brought before the judge, provided that they relate to an arbitration referred to in paragraph 1.*
> *The sixth part of the Judicial Code, as it was drafted before the entry into force of this Law, remains applicable to the actions pending or introduced before the judge regarding an arbitration referred to in paragraph 2".*

Article 34 referred to by Article 59 adds a new Article 1702 in the Judicial Code drafted as follows:

> *"Unless otherwise agreed by the parties, the arbitral proceedings begin on the date on which the arbitration request is received by the defendant, in accordance with Article 1678, § 1, a)".*

Finally, the aforementioned Article 1678 of the Judicial Code meanwhile states:

> *"§ 1 Unless otherwise agreed by the parties, communication is delivered or sent to the receiver in person, or to their domicile, or their residence, or to their email address or if it is a legal entity, to its registered office, or its main establishment or to its email address.*
> *§2 Unless otherwise agreed by the parties, the deadlines that start to run with respect to the recipient, from communication, are calculated:*
> *a) when the communication is carried out by delivery against dated acknowledgement of receipt, from the first day that follows;*
> *b) when the communication is done by email or by another means of communication that provides proof of dispatch, from the first day following the date indicated on the acknowledgement of receipt (…)".*

In this case, the SCC communicated the arbitration request to Kazakhstan in a letter dated 5 August 2010, received on 11 August 2010.

Kazakhstan hence maintains that in application of the above-mentioned provisions, the sixth part of the Judicial Code, as it was drafted before the entry into force of the Law of 24 June 2013, is applicable to the entire contentious arbitral proceedings including during its judicial period.

The Statis believe, however, that Article 59 of the Law of 24 June 2013 only applies to Belgian arbitrations and not to international arbitrations, which are subject to the principle of immediate applicability of procedural law provided for in Article 3 of the Judicial Code. They conclude from this that the order of 11 December 2017 was rightly made on the basis of part 6 of the Judicial Code as amended by the Law of 24 June 2013.
Article 1676, in its version in force since 1 September 2013, in particular sets out that:

> *"§ 7. The sixth part of this Code applies and the Belgian judges are competent when the place of arbitration within the meaning of Article 1701, § 1, is located in Belgium, or if the parties have agreed as such.*
>
> *§ 8. By way of derogation from § 7, the provisions of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 apply regardless of the place of arbitration and notwithstanding any conventional clause to the contrary".*

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

By giving a list of derogations from specific articles, without any reservations or opportunity to supplement the list, Article 1676, § 8 may not be interpreted as involving the applicability of other provisions of the sixth part of the Judicial Code to foreign arbitral proceedings. The complete and restrictive nature of the list of articles given in Article 1676, § 8 is unequivocal.

To maintain, as Kazakhstan has done, that this list of derogations would only be an example is contrary to the elementary principles of legislation including those of legal certainty.

Such interpretation would also be contrary to the clear text of Article 1676, § 8 that allows the application of only Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 to foreign arbitral proceedings.

Neither Article 1678, which shall fix the mode of communication between actors in arbitration, or Article 1702, which sets the beginning of arbitral proceedings, are not part of the provisions covered in Article 1676, § 2 applicable to foreign arbitral proceedings.

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

In general, it is not the duty of the Belgian legislator to define the arbitral proceedings applicable to a foreign arbitration. In this sense, the list of derogations given in Article 1676, § 8 only applies to provisions that do not affect the substantive rules of the arbitral proceedings, provisions such as, for example, the enforcement procedure of an interlocutory or final award.

It would be equally inappropriate to take into account the start date of foreign arbitral proceedings that are not governed by Belgian law to determine which version of the latter is applicable in the event of enforcing the award[1].

Therefore, by referring to Article 1678, § 1 cited above, Article 1702 can only define the start of Belgian arbitral proceedings, to the exclusion of that of foreign arbitral proceedings.

The fact that, for the sake of consistency, the Belgian legislator has resumed the same process of communication as defined in the UNCITRAL model law does not allow one to consider that it intended to extend the scope of application of Article 1702 beyond the Belgian proceedings.

The parties each also call on the *ratio tegis* of Article 59 set out as follows during parliamentary work:

"for reasons of legal certainty, it is not desirable that one arbitral proceeding is subject to two categories of separate rules for procedural law of arbitration. Distortions should thus be avoided in the rules of arbitration of arbitration institutions prepared based on the current procedural law of arbitration, because these rules of procedure for rules of arbitration frequently apply to arbitrations in progress"[2].

However, to the extent that foreign arbitral proceedings are never subject to Belgian law, except in the context of the execution of the award, there is no risk that one arbitral proceeding is subject to two categories of separate rules under Belgian law. Therefore, the risk during the preparatory work necessarily only applies to the proceedings initiated before a Belgian arbitral tribunal before September 2013 and whose execution is pursued before the Belgian enforcement court post–September 2013.

[1] N. BASSIRI and M. DRAYE, *Arbitration in Belgium,* 2016, Leuven, Wolters Kluwer, p. 545

[2] *Doc. parl.,* Chamber, 2012–2013 session, 53-2743/1, pp. 44–45.

As stated by the Statis, the Court of Amsterdam maintained the same reasoning in connection with the application for enforcement introduced in September 2017 in the Netherlands.

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

Article 4 of the Law of 2 June 2014 states, however, a specific transitional period comparable to the Belgian transitional system.

In its ruling of 6 November 2018, the Court of Appeal of Amsterdam deduced from the text of Article 4 of the Dutch law and its preparatory work that this transitional system provided for in the Law of 2 June 2014 did not apply to international arbitrations already underway at the time of entry into force of the said Law. The Court has held that "*these arbitral proceedings* (international arbitrations) *were not subject to the previous legislation on arbitration, such that this legislation cannot 'remain' applicable on the basis of non-retroactive effect and consequently the problem of applicability of two different types of arbitral procedural law to the same legal proceedings does not apply"* (exhibit 7.2, Statis' file, free translation not contested, their submissions, p. 60).

Therefore, both the clarity of the text and the *ratio legis* of the transitional exception system are used to designate the Judicial Code as amended by the Law of 24 June 2013 as the version applicable in this case.

It is therefore justifiable that the order of 11 December 2017 was adopted by the French-language Court of First Instance of Brussels operating in accordance with Articles 1680 § 6, 1719 and 1721 of the new Judicial Code.

The first argument for cancellation of this order is unfounded.

For the remainder, the court states that the entry into force of the Law of 25 December 2016 covering various provisions in justice (called the "Pot pourri IV" Law) does not go against the foregoing considerations[3].

[3] The preparatory work of the law in fact unequivocally indicated that "*this project concerns the amendments made to the new sixth part, inserted in 2013. Thus, there is no need for any specific transitional provision. The arbitral proceeding underway in application of the former sixth part, and proceedings related thereto before the state courts pursuant to this same former sixth part, remain so in application thereof. Concerning the arbitral proceedings underway in accordance with the new part six, and proceedings related thereto before the state courts under the new sixth part, the recommendation of Article 3 of the Judicial Code shall apply" (Doc. parl.,* Chamber, 2015–2016 session, 54-1986/001, p. 91).

2. As for the law applicable to the examination of the second and third arguments

Kazakhstan is basing its claim to invalidate the enforcement order on the former Article 1704, § 3 of the Judicial Code.

However, as explained hereinabove, the transitional system provided for in Article 59 of the Law of 24 June 2013 is not applicable to foreign arbitrations so that the sixth part of the Judicial Code as amended by the Law of 24 June 2013 is directly applicable in this case.

As far as necessary, the court states that both Belgium and Sweden are signatories of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958, which is therefore, in principle, applicable.

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

> "*The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon".*

Article VII of the New York Convention therefore allows the party who applies for the enforcement of the award to assert the provisions relating to the performance of arbitral awards, more favourable to the enforcement, in force in the country where the enforcement is requested, in this case in Belgium, but only from the perspective of *favor arbitrandum*, i.e. with a view to increasing the recognition of foreign arbitral awards as widely as possible[4].

In reality, "*the provision of the most favourable law (mfl) is a consequence of the Convention's goal, which is to facilitate execution of foreign arbitral awards. It incorporates the principle that if the terms of the Convention are not met, the award may still be executed on another basis… The idea behind the mfl provision is to allow the enforcement of foreign awards in the largest number of cases possible"*[5].

In this case, the Statis explicitly opted for Belgian law in their enforcement application, considering it as including a more favourable system to arbitration than that provided for by the New York Convention. In its latest submissions, Kazakhstan takes note of this choice and draws the consequence that only "*the grounds for refusal of the enforcement will be developed according to the system of Belgian law provided for by the Judicial Code*" (third submissions of Kazakhstan, § 860, p. 215).

[4] see in this regard not. HANOTIAU B. and DUQUESNE B, "L'exécution en Belgique des sentences arbitrales belges et étrangères [The execution of Belgian and foreign arbitral awards in Belgium]", *J.T.,* 1997/17, no. 5841, no. 15–17; see also EKELMANS M., "des différents régimes juridiques applicables à l'exequatur d'une sentence arbitrale rendue aux Pays-Bas [various legal systems applicable to the enforcement of an arbitral award issued in the Netherlands]", *R.G.D.C.,* 2001, p. 542; LEFEBVRE P. and SERVAIS M., "les différents régimes organisant la reconnaissance et l'exécution des sentences arbitrales établis par la Convention de New York du 10 juin 1958 et leur coexistence avec d'autres conventions ainsi qu'avec les dispositions de droit national [different systems organising the recognition and execution of arbitral awards established by the New York Convention of 10 June 1958 and their coexistence with other conventions as well as with the provisions of national law]", *b-Arbitra*, 2018, book 2, pp. 251–300.

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

Therefore, Articles 1719 and 1721 of the new Judicial Code shall apply.

The court may then no longer retract the enforcement order after having observed, where applicable, the existence of one of the circumstances listed in Article 1721, § 1 of the new Judicial Code.

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

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

The Statis insist on the force of res judicata of the arbitral award under dispute and the enforcement judge's prohibition to carry out a review on the merits of such award.

These principles are not contested or contestable. However, they do not exempt the enforcement judge from reviewing the conditions of granting this enforcement as defined in Article 1721, § 1 of the Judicial Code.

The question of the definition of Belgian international law and order and the scope of the enforcement judge's control falls under a review of the merits of the argument.

3.2. <u>On the force of res judicata of the ruling by the Court of Svea of 9 December 2016 (principles)</u>

The Statis also invoke the force of res judicata of the ruling by the Court of Svea of 9 December 2016 and, to this end, request that the court to recognise it in accordance with Articles 22 et seq. of the CODIP.

Kazakhstan considers that such recognition is not possible since the CODIP is not applicable in arbitration.

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

Article 2 of the CODIP indicates that:

> *"Subject to the application of international treaties, the European Union law or provisions contained in specific laws, this law regulates, in an international situation, the jurisdiction of the Belgian courts, the determination of applicable law and the conditions of efficacy in Belgium of court decisions and foreign notarial deeds in civil and commercial matters".*

The CODIP thus establishes a supplementary system in which the areas covered shall be understood broadly[6].

The preparatory work of the law governing the Code of Private International Law indicate that the reference to civil and commercial matters does not in itself preclude arbitration as a subject[7]. In other words, "*the mere circumstance that the question at the centre of the dispute relates to arbitration does not provided outright rejection of the Code of Private International Law"*[8]*.*

Thus, and in the absence of an international treaty or other possible prescriptive grounds, the recognition of the foreign court decision that was handed down on a request to cancel an arbitral award is assessed on the basis of Articles 22 et seq. of the CODIP[9].

In this case, in the absence of international treaty between Belgium and Sweden on the recognition and enforcement of court decisions in arbitration, the additional rules laid down by the CODIP apply to the ruling of the Court of Svea.

b) scope of recognition of the ruling by the Court of Svea:

Unlike French law, which does not seem to recognise any international effect in decisions made following a procedure for annulment of an arbitral award, Belgian law more willingly recognises extraterritorial effects on a foreign decision in arbitration.

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

Thus, one of the essential extraterritorial effects of a foreign court decision is translated by Article 22 of the CODIP, which poses the principle of automatic recognition without procedure of such a decision in the Belgian legal system.

[6] M. FALLON, "Article 2", in J. Erauw e.a. (eds.), *Le code de Droit international privé commenté* [The Code of Private International Law with comments], Brussels, Bruylant, 2006, p. 9.

[7] *Doc. Parl.* Senate, 2003 special session, No. 3-27/1, p. 26.

[8] D. MATRAY and G. MATRAY, "L'exécution sur le territoire belge des sentences arbitrales étrangères annulées dans leur pays d'origine [Execution in the Belgian territory of foreign arbitral awards cancelled in their country of origin]", *Liber amicorum Glartsdorff et Legros*, 2015, p. 674.

[9] see in this regard Y. HERINCKX, "Droits d'enregistrement et sentences arbitrales [Registration fees and arbitral awards]", *b-Arbitra*, 2013/3, p. 298; C. VERBRUGGEN, "Annulment and enforcement of arbitral awards in Belgium", *in Annulment and enforcement of arbitral awards from a comparative law perspective – Contribution from Cepani40 colloquium held on October 18, 2018,* Kluwer, 2018, p. 17; A. HANSEBOUT, "De actualiteit van de arbitrale uitspraak: een conflict tussen het exequatuurvonnis en het vemietigingsvonnis. Noot onder Beslagr. Brussel [The topicality of the arbitral ruling: a conflict between the equivalent and destruction judgement. Note under Beslagr. Brussels] (Fr.) 8 June 2017", *b-Arbitra*, 2018/1, p. 99; Civ. Brussels, 8 June 2017 (distressed property division), *b-Arbitra*, 2017/2, p. 301.

Article 25, § 2 of the CODIP sets out that "*in no event can the foreign court decision be reviewed as to its substance*".

This last provision thus prohibited the requested State court from extending its control to the way in which the foreign jurisdiction decided on the points of fact and law that had been submitted to it.

However, Article 25, § 1 of the CODIP authorises the Belgian judge to not recognise a foreign judgement in certain circumstances listed restrictively. In this sense, it is possible to talk about the potentially limited international effects of a foreign decision ruling on an annulment appeal.

Article 25, § 1 indicates, in particular;

> *"a foreign court decision is not recognised or declared enforceable if:*
> *1) the effect of recognition or the declaration of enforceability would be manifestly incompatible with public law and order; this incompatibility is assessed taking into account, in particular, the intensity of the situation's attachment with the Belgian legal system and the severity of the effect produced in this way;*
> *2) the rights of the defence have been violated".*

Article 26, § 1, paragraph 2 also states that:

> *"the findings made by the foreign judge are dismissed to the extent that they would produce an effect that is clearly inconsistent with public order".*

Furthermore, recognition of a foreign decision rejecting a request to cancel an arbitral award also has a territorially limited impact insofar as "*the Belgian judge may refuse the enforcement of a foreign arbitral award that the courts of the State where the registered office is located have refused to cancel"*[10].

c) <u>effects of this recognition:</u>

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

In other words, *"recognition in particular has the effect to allow the force of res judicata in Belgium, which allows, in its positive aspect, to establish (indisputably, between the parties and, subject to proving the contrary, vis-à-vis third parties) what was decided abroad and, in its negative side, to oppose the exception of res judicata impeding the reiteration of the request in Belgium"*[11].

[10] P. COLLE and H. BOULARBAH, "de invloed van het bestaan van mogelijke nietigheidsgronden op het exequatur van een buitenlandse scheidsrecheterlijke uitspraak [the impact of the existence of possible grounds for invalidity on the enforcement of a foreign separate ruling", in *Liber Amicorum Jozef Van den Heuvel,* Antwerp, Kluwer, 1999, p. 178.

[11] H. BOULARBAH, "Efficacité des jugements et actes authentiques [Effectiveness of judgements and notarial deeds]", in "Le nouveau droit international privé belge [The new Belgian private international law]", 77.2005, par. 81.

Article 23 of the Judicial Code meanwhile provides that:

> "*The force of res judicata is only applicable with regard to what was the decision's subject. The requested subject must be the same; that the request is based on the same cause, regardless of the legal basis invoked; that the request must be between the same parties, and brought by them and against them in the same capacity".*

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

"the force of res judicata attaches to what the judge decided on a disputed point and to what, due to the dispute brought before him and subject to contradiction of the parties, constitutes, even implicitly, the necessary foundation of his decision.
In that there is no similarity between the subject and the cause of an action with a final decision and those of another action subsequently exercised between the same parties, it will not necessarily imply that such similarity exists in respect of any claim or dispute raised by a party in either of the proceedings or, therefore, that the court could accommodate a claim based on facts that cannot be reconciled with the previous res judicata"[12].

In this case, Kazakhstan argues that the recognition of the Court of Svea's ruling could not be accepted pursuant to Articles 25, § 1, 1° and 2° and 26, § 1, paragraph 2 of the CODIP.

It shall be the court's responsibility to review the extent to which the Court of Svea has already decided on either of the arguments invoked by Kazakhstan before this court.

If yes, the enforcement judge must consider whether the force of res judicata by the foreign decision does not produce an incompatible effect with Belgian international law and order prohibited by Articles 25 § 1 1° and 26 § 1, paragraph 2 of the CODIP or a breach of the defence's rights prohibited by Article 25 § 1 2° of the CODIP.

If not, the enforcement judge may directly exercise his power of control over the effects of the arbitral award, as defined in Article 1721, § 1 of the Judicial Code.

[12] Cass, decision no. C. 13,0338.F of 16 April 2015, available on www.juridat.be; see also Cass., 8 March 2013, *Pas*, I, 2013, p. 624; Cass. 31 January 2013, *Pas.*, 1, 2013, p. *266*; Cass. 4 December 2008. J.T., 2009, p. 303.

3.3. On the force of res judicata of other court decisions

The same reasoning applies to the foreign decisions dealing with the request for enforcement submitted by the Statis.

The extraterritorial effects of these various decisions will be all the more tenuous since these are not intended to intervene on the matter of the execution of the disputed awards in Belgium.

In this sense, the Statis furthermore acknowledge that the decisions seeking to grant or reject the enforcement are effective only within the territory where the enforcement is sought (see the Statis' submissions, § 451, p. 176).

4. As for the second argument based on the existence of fraud

Kazakhstan pursues the cancellation of the enforcement order by also citing the existence of fraud attributable to the Statis, which is likely to invalidate all of the arbitral proceedings.

4.1. On the lateness of the argument

The Statis felt that the allegations of fraud are inadmissible in that they should have been invoked in a timely manner, i.e. before the arbitration courts.

Article 1679 of the Judicial Code indeed states that:

> *"A party that, with full knowledge of the facts and without legitimate reason, refrains from citing an irregularity in a timely manner before the arbitral tribunal, shall be deemed to have waived availing itself of this right".*

It is the responsibility of the party claiming this provision to prove that the other party did indeed have knowledge of the irregularity that it failed to assert. The mere fact that the party could have or should know this irregularity may not be interpreted as a waiver of its right.

In this case, and contrary to that pleaded by the Statis, the witness statements of Ms Nacimiento and Mr Carrington, both advisers of Kazakhstan, do not make it possible to prove that the latter undoubtedly had knowledge of fraud during the arbitral proceedings.

At most, these testimonies show that Kazakhstan could have been informed of the Vitol arbitration and may have come into possession of the Perkwood contract, one fact among many on which Kazakhstan today bases its allegations of fraud. It does not suffice to prove that Kazakhstan was aware of the fraud to hide the capacity of the related party from the company Perkwood, nor a fortiori that it had knowledge of what it would later denounce as fraudulent inflation of investment costs.

The second argument is therefore not invoked late.

4.2. On the force of res judicata of the ruling of 9 December 2016 by the Court of Svea (application)

In accordance with Article 1721, § 1, b) of the Judicial Code, the Belgian enforcement judge must ex officio verify the compatibility of the arbitral award with Belgian public order. It is not his duty to check the compatibility of the arbitral award with the public order of another country, albeit that of the place of arbitration. Conversely, no foreign judge before whom is brought a request for cancellation of an arbitral award or an application for enforcement can make a decision on the compliance of the award with Belgian public order.

In its ruling of 10 August 2018, the Court of Appeal of London pointed out that public order falls under the assessment of each jurisdiction and that the English judge was not bound by the assessment made by the Court of Svea on compliance with Swedish public order (exhibit 3.9, § 38, Statis' file).

As part of its examination of the argument of the existence of fraud, the Court of Svea itself pointed out that its control was limited to the compliance of the arbitral award with Swedish public order. Moreover, the Court specifies the notion of the scope of Swedish public order in these terms:

- *"in accordance with Article 33 (1) (2) of the ASA* (Swedish law on arbitration), *an award is invalid if it, or the manner in which it is made, is clearly incompatible with the basic principles of the Swedish legal system. Swedish law adopts a restrictive approach concerning the possibility to obtain the cancellation of an arbitral award in accordance with the above-mentioned provision. The legislative history of the provision states that it only has the purpose of covering extremely complex cases and that, due to its narrow scope, it shall be applicable only very rarely, besides the fact that it covers cases where fundamental legal principles of a procedural nature on substance had been ignored (…)"* (exhibit 2.1., point 5.2.1., p. 32, Stati Group's file, free translation not contested);

- *"the awards based on false evidence do seem to be covered by the term public order"* (exhibit 2.1., point 5.2.1., p. 33, Stati Group's file, free translation not contested);

- *"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, there should therefore be no question of cancelling an award only because false evidence or false statements were presented while it is not clear that they have been directly material to the outcome (…). However, it is possible to consider situations where invoking a false statement may have an indirect effect on the tribunal during its examination of the dispute. However, given the narrow field of application and the restrictive nature that should exist when it is envisaged to open the way for a substantial new examination of the issue in dispute as part of a cancellation procedure, there should be no question, in the opinion of the Court, of enabling an indirect impact on the arbitral tribunal such that your award could be considered invalid other than where it is clear that this indirect influence had a decisive impact on the outcome of the case"* (exhibit 2.1., point 5.3.1., p. 36, Stati Group's file, free translation not contested).

Then, the Court of Svea accurately summarised that it "*finds that none of the circumstances invoked by Kazakhstan here, individually or as a whole, whether regarding the award, or the manner in which it was made, are clearly incompatible with the fundamental principles of Swedish law"* (exhibit 2.1., point 5.3.1., p. 37, Stati Group's file, free translation not disputed).

However, and as the High Court of London rightly notes in its ruling handed down on 6 June 2017 (exhibit 4.1, §§ 80 et seq, Statis' file), the Court of Svea did not rule on the existence of fraud vitiating the financial statements.

Indeed, the Court of Svea considered that:

- the evidence put forward by the Stati Group, considered to be fake by Kazakhstan, had no direct impact on the outcome of the arbitration, since the arbitral tribunal had based its decision on another element, namely the non-binding offer of KMG;
- KMP's indicative offer on its own was not false evidence, *"even if the potentially incorrect details of the amount invested in the LPG Plant through the annual reports of Tristan OU, KPM and TNG were among the factors that KMG took into account when calculating the offer amount. The allegedly false information in the annual reports is therefore not directly tied to the decision of the tribunal concerning the value of the LPG Plant"* (exhibit 2.1., point 5.3.1., p. 37, Statis' file, passage underlined by the tribunal);
- the possible concealment of certain information by the Stati Group is not cause for invalidity of the award with regard to the very narrow scope of the notion of Swedish public order.

It is therefore established that at no time did the Swedish decision rule on the question of the existence of fraud allegedly committed by the Statis.

The fact that Kazakhstan has presented before this court the same facts as those presented to the Court of Svea (see comparative table prepared by the Stati Group in their submissions, pp. 148–149) and the same qualification of those aspects as fraudulent acts is not enough to conclude on an authority of res judicata, in the absence of the court authority's position on the accuracy of these facts and their correct qualification in law. In other words, while the issue of fraud was indeed submitted to the Swedish courts, it is nevertheless true that they did not rule on it.

The Statis also maintain that the Swedish decision allegedly ruled on the question of the causal link between the possible fraud and the outcome of the arbitration.

However, in the same manner that it could not control compliance with Belgian international public order, the Swedish Court could not rule on the Belgian concept of causal link. Whatever the similarities between the two national laws in the matter, it suffices to note that the Court of Svea used the concepts “direct” or “indirect effect”, whether or not it has a “decisive effect” on the outcome of the award, and whose consequences differ from principles of causality under Belgian law.

Consequently, the force of res judicata of the ruling by the Court of Svea does not exempt this court from reviewing the award with regard to Belgian law, and more specifically Article 1721, § 1 a) ii) and (b) of the Judicial Code.

4.3 On the basis of the second argument on conflict with public order

a) definition of public order

It is understood that when they appear among the conditions required for obtaining the enforcement of a foreign award, the words “public order” must be understood in the sense of “international public order”[13].

Belgian international public order is defined by the Court of Cassation in terms of private international law as all the rules by which the legislator meant to devote a principle that it considers essential for moral, political or economic order and that, for this reason, must necessarily exclude the application in Belgium of any contrary or different rules of a foreign law[14].

Finally, unlike Article 1717 § 3 b) iii) of the Judicial Code identifying fraud as being one of the causes of cancellation of an arbitral award, Article 1721, § 1 b) does not include fraud as a cause of withdrawal of an enforcement order.

However, it is neither disputed nor disputable that fraud could be involved in conflict with public order[15].

[13] see E. KRINGS and L. MATRAY, “Le juge et l’arbitre [The judge and the arbitrator]”, *R.D.I.D.C.*, 1982, p. 245.
[14] see Cass., 4 May 1950, *Pas.*, 1950, I, p. 624; and more recently Cass., 18 June 2007, *R.T.D.F.*, 2007/4, p. 1127–1130.
[15] see C. VERBRUGGEN, “6.3. Award Obtained by Fraud”, in *Arbitration in Belgium. A practioner’s guide,* Kluwer Law International, 2016, p. 482, no. 98

b) <u>scope of controlling compliance with international public order by the enforcement judge</u>

The French Court of Cassation has chosen a restrictive approach under which the control of compatibility of an arbitral award with international public order by the cancellation judge should be limited to the obvious, effective concrete nature of the alleged violation[16].

The ECJ meanwhile seems to have used an extensive approach by considering that:

"The requirements relating to the effectiveness of the arbitral proceeding justify that the control of arbitral awards takes on a limited nature and that the cancellation of an award can be obtained only in exceptional cases (…)
However, the Court has already found that, to the extent that a national court must, according to its internal rules of procedure, grant a request for annulment of an arbitral award based on ignorance of the national rules of public order, it must also grant such a request based on the ignorance of EU rules of this type (…)
Given the foregoing, there is need to answer the question that arises that the directive must be interpreted in the sense that it implies that a national court, before which an action for annulment of an arbitral award is brought, assesses the nullity of the arbitration agreement and cancels this award on the grounds that said agreement contains an unfair clause, even though the consumer invoked this nullity not in the arbitral proceedings, but only in the appeal for cancellation"[17].

In Belgium, the Court of Cassation has not yet expressly ruled on the intensity of control of international public order by the judge for the cancellation of an international award or the enforcement judge.

By virtue of the principle of *de favor arbitrandum*, the interpretation of grounds for refusal of the enforcement must be restrictive and promote the flow of arbitral awards.

However, the restrictive interpretation of grounds for refusal of enforcement does not preclude an effective control of the effect of a foreign award on Belgian international public order. The efficacy of such control implies an understanding of elements of fact and law in order to verify the adequacy of the solution adopted by the arbiter with Belgian international public order[18].

[16] see Cass., fr., 4 June 2008, case No. 06-15.360 available on Légifrance and in *Rev. arb.*, 2008, p. 473.

[17] ECJ 26 October 2006, *Elisa Maria Mostaza Claro v. Centra Movii Mitenium SL*, case C-168/05.

[18] see in this regard P. LEFEBVRE and M. SERVAIS, "vers une conception large de l'ordre public à l'instar de la portée qui lui est conférée dans le cadre de l'annulation de sentences arbitrales [towards a broad view of public order like the scope granted to it within the framework of cancellation of arbitral awards]", *b-Arbitra*, 2014/2, p. 333; B. HANOTIAU and O. CAPRASSE, "L'annulation des sentences arbitrales [The cancellation of arbitral awards]", J.T., 2004, p. 418.

Fraud precisely forms part of these elements of fact of which the enforcement judge may verify the existence without it being a matter of review on the merits of the award.

A full and unencumbered control of the existence of fraud is all the more justified since in arbitration matters there is no comparable recourse to the civil petition that allows for the withdrawal of court decisions handed down in force of res judicata as set out in Articles 1132 et seq. of the Judicial Code.

However, fraud cannot be considered a reason for rejection of enforcement unless it is established that it had an impact on the arbitral award. This review of the impact of the fraud on the award is justified by the fact that it is up to the enforcement judge to verify only if the execution of the award itself is contrary to Belgian international public order, and not to review the merits of the dispute subject to arbitration. Thus, *"even assuming that the award contains a breach of public order, it should not be cancelled if there is anything else that justifies the same end result in the dispute in question"*[19].

This requirement of causality between fraud and the outcome of the award is used to reconcile two requirements imposed on the enforcement judge: to ensure effective protection of public order of which he is the guardian, on the one hand, and not to proceed with a review on the merits of the award, on the other hand.

In addition, the *favor arbitrandum* requires the enforcement judge to also find that the fraud invoked has had a clear and certain impact on the award, or, in other words, that it is *"the decisive cause"*[20].

Furthermore, Article 1721, § 1, b) ii) of the Judicial Code provides that the court only refuses the enforceable declaration of an arbitral award if it feels that *"the execution of the award would be contrary to public order".*

Contrary to what is claimed by Kazakhstan, it is therefore indeed the effect execution of the award in Belgium that must be analysed, and not the award itself.

Finally, the terms of Articles 1721, § 1, b) ii) above also imply taking into account the intensity of the links to the situation with the Belgian legal system[21].

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

In this case, Kazakhstan intends to denounce two types of fraud:

[19] B. HANOTIAU and O. CAPRASSE, *op. cit.*, p. 418.

[20] G. KEUTGEN and A. DAL, *L'arbitrage en droit belge et international* [Arbitration in Belgian and international law], Volume I, Bruylant, 3rd ed., 2015, p. 549, No. 685.

[21] see in this regard R. JAFFERALI, "l'ordre public, de l'arbitrage international aux conflits de juridictions [public order, international arbitration in jurisdictional conflicts]", in *Liber amicorum Nadine Watté*, Bruylant, 2017, p. 326.

- an initial series of fraud committed by the Statis that aims to inflate the investment costs for the construction of the LPG Plant;
- a second instance fraud that aims to inflate their damages through the conclusion of the Laren transaction.

The arbitral tribunal reiterated the terms of Article 13 (1) of the ECT, which covers the "compensation" aimed at compensating investors in the event of expropriation, and under which:

"This compensation is equivalent to the fair market value of the expropriated investment at the time immediately preceding the expropriation or when the announcement of expropriation was formally known and affected the investment's value, hereinafter referred to as the *'Valuation Date'*." (exhibit 1.1, arbitral award, § 1460, Statis' file).

This provision grants the arbitrator a broad power of assessment regarding the compensation's amount, this fair market value, which he determines in fairness.

When assessing the damages due for the LPG Plant, the arbitral tribunal first considered that "*the best source of assessment*" was the contemporary offers made by third parties who estimated the plant at USD 150 million on average "*not as salvage value, but for possible operation*". In doing so, the arbitral tribunal therefore favoured the fixed value determined on the basis of expected future profits. In this respect, it took the position of Kazakhstan for which neither the investment value nor the book value "*defined as the investment value minus accumulated amortisation*" were useful in assessing the fair market value (see the arbitral award, §§ 1724 and 1725).

The arbitral tribunal then maintained the amount included in the non-binding offer of KMG, considering "*this value as the best relative source of information*" (arbitral award, § 1747).

However, it is apparent from the exhibits filed that:

- the *due diligence* report prepared by the audit firm KPMG on 29 August 2008 indicates immediately and in the introduction that the audit does not provide any opinion or certification whatsoever over the 2006 and 2007 financial statements (exhibit 6.7.b, p. 2, Statis' file).
- the confidential Memorandum on Project Zenith distributed to potential buyers also and expressly issues any reservation regarding the validity, accuracy and completeness of the information provided, hence including on the 2006 and 2007 financial statements (exhibit 6.27, pp. 1 and 2, Statis' file).
- The non-binding offer of KMG indicates that it was based upon the Memorandum and "other publicly available information". The non-binding offer also specifies that failing sufficient information, the purchase value of the LPG Plant was calculated according to a combination of two valuation methods: the comparative method and the historical cost method (exhibit 6.20, p. 1076, Statis' file).The Memorandum was thus only one source among others used for the assessment of the LPG Plant integrated into the overall non-binding offer, while the investment cost method was not the sole basis for the assessment of the purchase value of the LPG Plant used by KMG.

The arbitral tribunal ruled, in fairness, taking into account both the non-binding offers of third parties based on expected future income and on KMG's non-binding offer, itself based partially on the Memorandum, which is perfectly explicit on its own limits.

In addition, the fair market value of the LPG Plant has been set by the arbitral tribunal at USD 199,000,000, while the Statis requested compensation valued at USD 329,077,000, in other words the investment costs that they assessed at USD 245,000,000 plus the future value above the cost.

Contrary to what is claimed by Kazakhstan, the mere fact that the arbitral tribunal took note of the position of the Statis that they had invested USD 245,000,000 for the LPG Plant does not suffice to determine that this element will have been critically important in assessing the damage while on the contrary, the arbitral tribunal has expressly indicated that the bids submitted by third parties, calculated on the basis of any future use, represented the best source of assessment.

In these circumstances, it has not been established that the arbitral tribunal would have taken into account the investment costs to determine the fair market value of the LPG Plant.

In this sense, the Court of Svea furthermore considered that "*the allegedly false information in the annual reports are thus not directly related to the court's decision concerning the value of the LPG Plant"* (exhibit 2.1., p. 37, Statis' file, free translation not contested).

In other words, Kazakhstan has not submitted evidence of the determining causal link between the allegedly fictitious inflation of the 2006 and 2007 financial statements and the amount of the damage as maintained in fairness by the arbitral tribunal.

As for fraud deduced from the Laren transaction, Kazakhstan maintains that the Statis have deceived the arbitral tribunal by asserting that:

- the company Laren was not a related party;
- the lack of funds was due to Kazakhstan's shares;
- the opportuneness of concluding a loan at 15% with Crédit Suisse had been lost because of Kazakhstan's share, while an internal note from the Statis' financial advisors would determine that they decided, voluntarily, to give up a loan at a real rate of 44.7%.

The arbitral tribunal considered in connection with the Laren transaction that:

"1413. In addition, the Court is not convinced by the Defendant's argument according to which the Claimants did not prove that the MERM's shares caused the refusal of the loan agreement from Crédit Suisse. Moody's and Fitch confirmed that the MERM's shares against KPM and TNG raised concerns as to the ability of the companies to pay their existing debt. The Tribunal agrees with the Claimants that it would have been surprising for them if a lender granted new financing without that disputes between the Claimants' and the Kazakh government having been resolved.
1414. It is clear that, even before the trial of Mr Cornegruta, the relentless barrage of inspection and, possibly, the charges against most of the senior executives of KPM, when they are taken into consideration with these asset seizures made before the trial of 30 April 2009, have handicapped the Claimant companies.
1415. The Parties agree, as does the Tribunal, that the Claimants were only able to face the storm of summer 2009 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 Claimants. (…). In addition, the Parties agree, as does the Tribunal, that if the Claimants 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 Claimants 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 Claimants 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 Mr Cornegruta trial in August and in December 2009, forced the Claimants to accept the "appalling" Laren loan.
1417. In addition, the Court notes that, despite TNG's obvious attempts to meet Kazakhstan's demands, the State never responded to TNG's requests of 24 and 25 March 2009, requests that the State had required. Therefore, the claim alleged of Kazakhstan concerning the pre-emptive rights of first refusal was also persisted for the following two years. This was undoubtedly a shadow over the property rights of Terra Raf, which created persistent difficulties for the Claimants" (arbitral award, p. 320).

In challenging the consequences of its actions on the conclusion of the Laren transaction, Kazakhstan is actually going back to the dispute's merits, as ruled on by the arbitral tribunal, and to which it is not the duty of the enforcement judge to return.

Concerning the capacity of party related to the company Laren, the arbitral tribunal duly noted the contrary positions of the parties (see for the Statis, exhibit 8.34 of Kazakhstan's file, submissions in the arbitration, § 354, and for Kazakhstan, the arbitral award, § 1349), without, however, considering that this justified dismissing the damage resulting from this transaction. The arbitral tribunal had therefore not been misled as to this element, which was subject to adversarial debate.

Furthermore, the court states that the internal note invoked by Kazakhstan specifically indicates that the rate proposed by Crédit Suisse was 15%, that the real interest rate of 44.7% took into account all transaction costs and that this loan had to be given up in particular due to the constraints and the uncertain environment in which the Statis found themselves (see exhibit 8.19.b, Kazakhstan's file). Therefore, there is also no reason to consider that the arbitral tribunal would have been misled as to the rate proposed by Crédit Suisse and the causes for waiving this loan.

Finally, the arbitral tribunal considered that Kazakhstan's shares were in causal link with the lack of liquidity of the Statis, without considering, however, that these were the exclusive cause thereof. This impact, even partial, of Kazakhstan's shares on the Statis' liquidity issues sufficed, in the arbitral tribunal's opinion, to incur the liability of Kazakhstan.

Therefore, the fact that the Statis are themselves partially responsible for their liquidity problems does not change anything with regard to the arbitral tribunal's assessment.

Ultimately, Kazakhstan has failed to demonstrate that the arbitral tribunal would have been misled as to the causes of the Laren transaction, nor that this alleged deception would have affected the award's outcome.

It results from the preceding developments that Kazakhstan has not provided proof that the acts of fraud invoked had a clear and certain impact on the award's outcome, or, in other words, that they are "*the decisive cause*".

Consequently, Kazakhstan has also not established in what way the alleged acts of fraud may have had the effect of rendering the recognition or execution of the arbitral award contrary to Belgian international public order.

The lack of causal link between the alleged acts of fraud and the infringement of Belgian international public order is again reinforced by the tenuous, even non-existent nature of the link between the situation and the Belgian legal system.

Indeed, it is a dispute between a State, Kazakhstan, and Moldovan investors expropriated of their facilities in Kazakhstan, which was settled by a Swedish arbitral tribunal pursuant to foreign laws and not Belgian law, and subject to the control of Swedish courts.

The reason deduced from Article 1721, § 1, b) of the Judicial Code is not met.

4.4. On the basis of the second argument on the impossibility for the party against whom the award is pronounced to assert their rights

Kazakhstan also reproaches the Statis for having prevented it from contesting before the arbitral tribunal the investment costs of the LPG Plant by concealing their relationship with the companies Azalia and Perkwood.

Article 1721, § 1, a) ii) of the Judicial Code provides that the tribunal does not refuse the enforcement declaration of an arbitral award at the request of the party against whom it is invoked, if said party provides proof "*that it was impossible for it to do so for another reason than asserting its rights; in such cases, it cannot, however, refuse (…) the enforcement declaration or the arbitral award if it is established that the irregularity has not had an impact on the arbitral award*".

Kazakhstan maintains that if it was aware of the fraud that it denounces today during the arbitral proceedings, the debate on the cost of the LPG Plant would have been completely different.

As developed above, the causal link between the alleged fraud and the outcome of the arbitral award is missing, so that its reason for rejection of the enforcement is no longer acceptable.

The second argument will therefore be rejected.

5. As for the third argument on the unlawfulness of the arbitral proceedings

Kazakhstan is pursuing the invalidation of the enforcement order by citing the unlawfulness of the appointment of an arbitrator by default and in its name and non-compliance with the three-month waiting period prescribed by Article 26 § 2 of the ECT.

5.1. On the breach of the compulsory waiting period ("*cooling off period*")

Kazakhstan considers that the three-month waiting period prescribed by Article 26 § 2 of the ECT has not been observed so that the dispute was not validly brought before the arbitral tribunal.

On the substance, the Statis for their part maintain in particular that the arbitral proceedings were suspended for three months at the request of Kazakhstan in order to authorise the negotiations provided for in the aforementioned Article 26 and thus to rectify this irregularity.

Primarily, the Statis invoke the force of res judicata of the ruling by the Court of Svea to plead the inadmissibility of the argument.

In addition to the principles set out above in point 3.2., there is cause to recall that to delimit res judicata benefiting from this authority, we need to *"compare what was previously judged on a point in dispute with what is currently submitted to the judge, the comparison bearing both on the facts and on the rule of law applied to these; in one word, it is necessary to consider whether the new claim may be admitted without destroying the benefit of the earlier decision"*[22].

In its ruling of 9 December 2016, the Court of Svea ruled on the issue of respecting the mandatory cooling off period and referral to the arbitral tribunal, considering that Article 26 § 2 of the ECT could not be interpreted as setting a condition that must be met for matter to be validly brought before the arbitral tribunal. The Court also noted that the purpose of Article 26 § 2 of the ECT could also be achieved if the arbitral tribunal decided, as it has done in this dispute, to suspend the proceedings for a certain period to allow the parties to negotiate.

It should therefore be noted that, given that the same facts were brought before it as before the Swedish Court, namely the non-compliance by the Statis with the mandatory cooling off period and its impact on the validity of the referral to the arbitral tribunal, this court is required to interpret the same legal standard as that submitted to the Court of Svea, namely Article 26 § 2 of the ECT, and to apply it to these same facts.

Therefore, this court could not again settle the issue of respecting the mandatory cooling off period and its impact on the referral to the arbitral tribunal without disregarding the force of res judicata of the ruling by the Court of Svea.

In that it refers to non-compliance with the three-month waiting period pursuant to Article 26 § 2 of the ECT, the argument is therefore inadmissible.

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

Kazakhstan considers that the default appointment of Professor Lebedev was unlawful such that the enforcement should be refused in accordance with Article 1721, § 1, a) i) (invalid arbitration agreement), ii) (lack of information on the appointment of an arbitrator or the arbitration proceedings), iii) (dispute not covered by the arbitration agreement) and v) (formation of the arbitration court or arbitral proceedings does not comply with the parties' agreement) and b) ii) (breach of public order) of the Judicial Code.

[22] G. DE LEVAL, *Droit judiciaire [Adjective law] – Volume II*, Brussels, Bruylant, 2015, pp. 708–709.

In its ruling of 9 December 2016, the Court of Svea ruled on the compliance by the arbitral tribunal with the Rules of the SCC by considering that:

"it can thus be seen from the inquiry that Kazakhstan has had a chance to respond to the arbitration request of the Investors and that it was possible for Kazakhstan to appoint an arbitrator. However, neither the instructions, nor the reminder explicitly stated that an arbitrator should be appointed by Kazakhstan. The question is knowing whether Kazakhstan was thus deprived of its right to appoint an arbitrator.
(...)
In the opinion of the Court, it is useful to note that, in the instructions in question, reference was made to Article 5 of the Rules of the SCC, which were also attached. In accordance with Article 5, the defendant must, where applicable, indicate the name and address of the arbitrator appointed by it in its declaration. In the arbitration request, the Investors requested that the tribunal would be composed of three members and it follows from Article 12 of the Rules of the SCC that the tribunal should consist of three members, unless the parties have agreed otherwise and if the SCC decides that the dispute should be decided by a sole arbitrator. In this case, the SCC had not made any decision of this kind. Through instructions and additional documents that were attached, Kazakhstan received sufficiently clear information, in the opinion of the Court, according to which the arbitral tribunal would be composed of three members and Kazakhstan would have an opportunity to appoint one of them.
Kazakhstan also objected that the response time to the SCC was too short and that it was difficult to understand the SCC's documents because they were written in English. Concerning the period's length, the Court noted that this cannot be considered as unacceptably short, even in an international perspective. In addition, the fact that Kazakhstan never contacted the SCC to request an extension of the deadline is of particular importance to assess the language and deadline issues. The first instructions contained the names, email addresses and direct international telephone numbers of the officials responsible for the matter. It also emerges from the Rules of the SCC that it is possible for a party to obtain a deadline extension. In this regard, it is also important to take into account the fact that Kazakhstan had previously been party to procedures conducted by the SCC in English.
With respect to the question that Kazakhstan never had an opportunity to comment on the SCC's proposal according to which Sergei Lebedev should be appointed as arbitrator on behalf of Kazakhstan, we can note that the Rules of the SCC do not contain any provision allowing such a comment.
(...)
In the context of the arbitration agreement, it was decided that the SCC's rule applied to the proceedings, including the appointment of the arbitrators.
(...)

Paragraph 3 of Article 13, which regulates the event that the tribunal shall be composed of several members, is of particular interest. The provision stipulates that 'when a party does not appoint an arbitrator within the stipulated deadline, the board must appoint one'. However, no mention is made of the deadline to do this.
Article 13 also contains provisions governing what must be taken into account when the SCC appoints an arbitrator, such as language and nationality. As indicated above, on the other hand, there's nothing that says that the party should also have the opportunity to comment on who should be appointed when the SCC appoints an arbitrator on its behalf. What emerged during the course of the investigation into the administration of the SCC does not show, in the opinion of the Court, that, as regards the Rules of the SCC or the Law on arbitration, that a procedural error was committed when opening the arbitration and when Sergei Lebedev was appointed. Therefore, the principle according to which the parties should benefit from equal treatment can also not be deemed to have been violated, in particular in view of the fact that Kazakhstan received all the relevant documents and sufficient deadline to make comments".

Given the force of res judicata of the Swedish decision, the tribunal is bound by the position of the Court of Svea concluding in this case on compliance with the Rules of the SCC by the arbitral tribunal.

The tribunal then notes that the proceedings as prescribed by the Rules of the SCC are not contrary to the fundamental procedural principles of the Belgian legal system.

Insofar as it is thus ruled that the Rules of the SCC were applicable to the arbitration and were complied with, no grounds for refusal of the enforcement referred to in Article 1721, § 1 a) i), iii) and v) of the Judicial Code are admissible.

Furthermore, it is apparent from the filed exhibits that at the latest on 11 August 2010, the date of receipt by the relevant department in the Kazakh administration of the letter from the SCC dated 5 August 2010, Kazakhstan was informed of the Statis' choice for a tribunal to be composed of three arbitrators and the need for the Republic to choose its own arbitrator.

Indeed, the request for arbitration communicated by the SCC indicated the Statis' wish to use a tribunal composed of three arbitrators and the recourse, where applicable, to appoint an arbitrator by default for Kazakhstan in accordance with Article 13 (3) of the Arbitration Rules of the SCC.

The SCC's letter transmitting this request also made express reference to Article 5 of the Arbitration Rules, which provides that:

"(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:

(i) any objection as to the existence, validity or applicability of the arbitration agreement; however, if the Defendant does not raise any objections, it may nevertheless raise such objections later at any time until the filing of the pleadings in defence;
(ii) an acceptance or dispute of the request's subject contained in the arbitration request;
(iii) a preliminary statement of possible counter-claims or requests for compensation;
(iv) any comments on the number of arbitrators and the seat of arbitration; and
(v) where applicable, the name, address, telephone number, fax number and email address of the arbitrator appointed by the Defendant.
(2) The Secretariat will send the Response to the Claimant. The Claimant will be able to submit comments on the Response.
(3) If the Defendant does not submit a Response, this does not prevent the arbitration from taking place" (exhibit 1.30, Statis' file).

It is therefore established that Kazakhstan had knowledge of the specific aspects of the response that it was supposed to provide in such letters, including on the composition of the arbitral tribunal and the arbitrator's name that it wished to appoint.

The reason for refusal of enforcement taken from Article 1721, § 1, a) ii) of the Judicial Code is therefore not established.

Finally, Kazakhstan asserted that its defence rights were not respected by the SCC.

Again, the force of res judicata of the Swedish decision does not allow the tribunal to return to how the SCC has applied its rules. It suffices to note that the Court of Svea considered that the SCC had respected the latter and that "*the principle according to which the parties should benefit from equal treatment can also not be deemed to have been violated, in particular in view of the fact that Kazakhstan received all the relevant documents and sufficient deadline to make comments*" (exhibit 2.1, Statis' file, p. 47).

For the surplus, although we can admit that respecting the defence's rights is included in Belgian procedural public order, it should be noted that in this case, the defence rights of Kazakhstan were not flouted.

In fact, nearly four months after the first request from the SCC and after four notifications from the latter, Kazakhstan has, for the first time, challenged the appointment of Professor Lebedev, without, however, offering a name for a substitute arbitrator. The SCC examined these observations and dismissed Kazakhstan's objection after having considered that "*no reason for recusal of Professor Sergei N. Lebedev was found*" (exhibit 1.22, Statis' file).

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

As far as necessary, the argument taken from the presence of one of the Statis' lawyers at the meetings of the SCC Board is not relevant either. It indeed follows on the one hand, from the minutes of the meeting of 15 September 2010 at which Professor Lebedev was appointed, that the lawyer in question, Ms Margrete Stevens, was not present (exhibit 1.26, Statis' file), and on the other hand, from the minutes of the meeting of 15 December 2010, that Ms Stevens did not take part in the decision on Kazakhstan's contestation relating to the appointment of Professor Lebedev (exhibit 1.21, Statis' file).

Consequently, the third argument put forward by Kazakhstan in support of its request for cancellation of the enforcement order is also dismissed.

IV. DECISION

Given the reasons set out above, the Tribunal, ruling in an adversarial manner;

Declares Kazakhstan's request admissible, but unfounded; Consequently, dismisses it;

Orders Kazakhstan to pay the costs of the liquidated proceedings on the Defendants' part at €36,000;

It is thus ordered, adjudged and decreed at the public hearing of the 4th chamber of French-language Court of First Instance of Brussels on 20 December 2019 at which were present and sitting:

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

[signature] [signature]

KHALED **MALENGREAU**