ruling of the appellate court

AMSTERDAM

civil law and tax law division, team I

case number: 200.224.067/0

ruling of the panel of judges of the civil chamber of 14 July 2020

concerning

1. Anatoli STATI,
residing in Chisinau, Moldova,
2. Gabriel STATI,
residing in Chisinau, Moldova,
3. ASCOM GROUP S.A.,
having its registered office in Chisinau, Moldova, and
4. TERRA RAF TRANS TRAIDING LTD.,
having its registered office in Gibraltar,
attorney: *meester* K.J. Krzeminski, Attorney at Law in Rotterdam,

and

1. REPUBLIC OF KAZAKHSTAN,
established in Astana, Kazakhstan,
including:
THE REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),
established in Astana, Kazakhstan,
attorney: *meester* A.W.P. Marsman, Attorney at Law in Amsterdam, and
2. SAMRUK-KAZYNA JSC,
having its registered office in Astana, Kazakhstan,
Attorney: *meester* H.F. van Druten, Attorney at Law in Amsterdam,
defendants.

1. The further course of proceedings

From here on, parties will be called Stati et al. (jointly referred to as applicants), Kazakhstan, National Fund and Samruk, respectively.

In this case, the court came to an interim ruling on 6 November 2018. Please refer to this interim ruling for the course of the proceedings until that date. The interim ruling erroneously does not mention that Stati et al. filed further evidence, exhibits 9 to 38, received by the court on 15 June 2018.

Subsequently, Kazakhstan filed a written submission after the interim ruling, with exhibits numbered 39 to 111, received on 5 February 2019.

In response, Stati et al. filed a written submission after the interim ruling, with exhibits numbered 46 to 111, received on 16 April 2019.

In their letter of 2 August 2019 with annex, Kazakhstan requested Stati et al. be ordered to pay the actual costs of the proceedings for the reasons explained in that letter.

Kazakhstan filed further evidence, received by the registry of the court on 16 August 2019 (exhibits 112 to 119), 20 August 2019 (exhibits 120 to 122) and 27 August 2019 (exhibit 123).

Kazakhstan then submitted a (secured) USB stick as evidence; however without the required access code meaning that the court was unable to examine the data on this USB stick.

Stati et al. submitted further evidence, received by the registry of the court on 19 August 2019 (exhibits 165 to 167).

Continuation of the oral hearings for the application took place on 27 August 2019. On that date, representing Stati et al, appeared *meester* Krzeminski, Attorney at Law, previously mentioned, *meester* M. van de Hei-Koedoot, Attorney at Law in Amsterdam, and *meester* T.R. Vaal, Attorney at Law in Rotterdam, and representing Kazakhstan *meester* Marsman, previously mentioned, *meester* M. Gerrits, I.S. Timman and *meester* R.W. Ledeboer, all Attorneys at Law in Amsterdam; and representing Samruk *meester* H.F. van Druten, Attorney at Law in Amsterdam. Kazakhstan, on one hand, and Stati et al. on the other hand, elucidated their positions through plea notes presented to the court. Stati et al. were further represented by E. Dzhazoijan, Attorney at Law with King & Spalding in London.

The ruling of the court was then issued.

2. Facts

In this case, the court takes the facts mentioned hereafter as the starting point. These facts result from undisputed arguments of the parties or the content of exhibits that have either not been contested or insufficiently contested, to which the parties refer in support of their arguments.

2.1 In the period between 1999 and 2004, Stati et al. (indirectly) acquired shares in two Kazakh companies, namely Kazpolmunay LLP, hereafter called KPM, and Tolkynneftegaz LLP, hereafter called TNG. KPM owned the exploitation rights for the oil field Borankol, and TNG for the oil field Tolkyn and the Tabyl Block, all located in Kazakhstan. At the Borankol field, TNG was supposed to construct a liquefied petroleum gas installation, hereafter called: the LPG installation. After a dispute between the parties in 2010, the exploitation rights for the oil fields were terminated.

2.2 In relation to this, Stati et al. filed for an arbitral procedure with an arbitral tribunal, according to the arbitration regulations of the Arbitration Institute connected to the Stockholm Chamber of Commerce, hereafter called: the arbitral tribunal and the SCC, respectively. Article 26(3) of the Energy Charter Treaty of 17 December 1994, hereafter called: the ECT, formed the basis of that arbitration. The arbitral tribunal pronounced its award on 19 December 2013, which was supplemented by an arbitral award of 17 January 2014. The arbitral tribunal ruled in its awards that Kazakhstan neglected the obligations it owed to Stati et al. under the ECT, and ordered Kazakhstan to pay to Stati et al. damages after deducting debts, amounting to USD 497,685,101. The amount included in this for loss related to the LPG installation was determined at USD 199 million. The arbitral awards are not appeallable.

2.4 Kazakhstan applied for annulment of the arbitral awards with the competent judge in Stockholm (Svea Hovratt). This Swedish court refused Kazakhstan's application by its decision of 9 December 2016. Kazakhstan then brought a judicial review (for annulment of the arbitral awards due to "grave procedural error") against the decision of the Swedish judge, which was refused by the Swedish Supreme Court in its judgment of 24 October 2017. No further legal remedies exist against the decision of the lower court which refused the application for annulment of the arbitral awards.

3. Further evaluation

3.1 Reference is made to that which has been considered and decided in the interim ruling, the contents of which should be considered as referenced and intercalated here. This case concerns the application made by Stati et al. for recognition and enforcement of those arbitral awards.

3.2 The interim ruling gave Kazakhstan the opportunity to examine the documents made available on 15 June 2018 in the English proceedings before the High Court as a result of the "disclosure", and to submit a selection thereof to the court and provide a written elucidation. The interim ruling also gave Kazakhstan the opportunity to admit to these proceedings the judgment of the High Court, which was expected to be pronounced before the end of 2019. It was also determined that Stati et al. would be allowed to respond by written submission, and that continuation of the oral hearing would be ordered afterwards.

3.3 In its written submission, Kazakhstan made it known that the English proceedings before the High Court had been withdrawn, so that a final High Court judgment could not be admitted to the proceedings. In its written submission, Kazakhstan then further elucidated the deception in the arbitral procedure it claimed took place. By means of its written submission, it also repeated and supplemented its application ex. Article 843a Rv. Application Article 843a Rv Stati et al. contested this in their written submission, after which the parties again orally elucidated their positions.

3.4 The application made by Stati et al. for recognition and enforcement of the arbitral awards is based on Article 1075 Rv in connection with Articles III and IV of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Collection of treaties and conventions 1959, 58), hereafter: the New York Convention. Kazakhstan has not contested that Article 1075 Rv and the New York Convention are applicable. Because the arbitral awards in the Contracting State of Sweden have been pronounced, the court assumes the applicability of the New York Convention and, with that, applicability of Article 1075 Rv. Kazakhstan argued in defence that recognition and enforcement must be refused for the reasons stated in Article V of the New York Convention. To this end, it firstly argued that these arbitral awards were obtained through deception, and that recognition and enforcement of those awards would therefore be in conflict with public policy within the meaning of Article V(2) of the New York Convention. Secondly, Kazakhstan argued that grounds for refusal are applicable within the meaning of Article V(1)(a), (b), (c) or (d). The grounds for refusal argued by Kazakhstan will be discussed and evaluated hereafter.

Procedural deception

3.5 Kazakhstan argues that the arbitral awards were obtained through deception by Stati et al. For refusal of the application for recognition and enforcement on those grounds, it does not suffice that claims which were made by Stati et al. in the arbitral procedure were found to be (partially) incorrect or incomplete after the announcement of arbitral awards. Consideration of the argument of procedural deception requires more than the (partial) incorrectness or incompleteness of those claims. This requires that facts, or circumstances, proven after the arbitral procedure and attributable to Stati et al, are of such gravity that execution of the arbitral awards should be refused. This requires, at minimum, that Stati et al. intentionally misled the arbitral tribunal, while the actions of Stati et al. also had proven influence on the formation of the arbitral awards.

3.6 When evaluating the existence of this ground for refusal, it must not be forgotten that adjudication of the original dispute between the parties is reserved for the arbitral tribunal. Pursuant to the applicable Article 1075(2) juncto 985 Rv, the judge exequatur must therefore not re-examine the case. It should also be mentioned that the Swedish judge in the annulment proceedings already examined whether or not the arbitral awards were obtained through deception or not, and determined that this was not the case. Although the Dutch judge exequatur must independently examine the presence of this ground for refusal, and Kazakhstan has supplemented parts of its claims in relation to deception, the findings of the Swedish judge must nevertheless be considered a strong indication that no procedural deception took place.

3.7 It must also be noted that the judgment of the English High Court of 6 June 2017 (see consideration 2.16 of the interim ruling), which ascertains fraud prima facie, was only a preliminary finding. Such a finding is, by its definition, not binding for adjudication of the case in question.

Deception concerning the costs of the LPG installation

3.8 Kazakhstan argues that the arguments of Stati et al. in the arbitral procedure were deceptive and that information was withheld about the construction costs of the LPG installation. In conflict with the truth, Stati et al. made it appear in the arbitral tribunal as if they had spent at least USD 245 million on the construction of the LPG installation. However, Stati et al. created constructions to fraudulently increase the construction costs. Stati et al. had a management fee of USD 43,852,108 charged to TNG, which they omitted to mention in the arbitral procedue was a party connected to them, without any contractual grounds, and without services being rendered in return. Secondly, a second party connected to Stati et al., Azalia, purchased parts amounting to USD 35 million and, via Perkwood, then sold these shares to TNG for the artificially increased price of USD 93 million. Thirdly, Stati et al. have, according to the court's understanding, recorded in its bookkeeping system an amount for fictional parts of USD 31 million and, fourthly, Stati et al. made TNG pay an amount of USD 72 million for components which were never delivered. Furthermore, Stati et al. deceptively submitted to the arbitral tribunal that the bid made by KMG (KazMunaiGaz) was a reliable indication of the value of the LPG installation. In 2008, Stati et al. made it appear to potential buyers (including KMG) of the LPG installation, that the construction costs of the installation amounted to approximately USD 193 million, although they knew this to be untrue. Kazakhstan's argument has always been that if the arbitral tribunal had known that KMG's bid was based on costs which had been altered through transaction with parties connected to Stati et al, it would have never regarded those costs as a reliable indication of the value of the LPG installation.

3.9 Stati et al. have contested these arguments. According to Stati et al., fictitious components were never recorded, nor were the prices of parts ever inflated for no reason. The prices of components were increased because costs were incurred for transport, insurance and services, because currencies were converted from Euros to Dollars, and due to a surcharge for management fees. These management fees were not charged without good reason. Under that name, Perkwood indeed provided services to TNG, for the benefit of the construction of the LPG installation. The components costing USD 72 million were indeed delivered. According to evidence submitted by Kazakhstan, these parts were found near the LPG installation in 2010. Stati et al. have also never failed to mention that Perkwood was connected to them. In any case, they never had the intention to mislead the arbitral tribunal. Stati et al. conclude in their defence that the alleged deception likewise had no influence on the outcome of the arbitral awards. The deliberations of the court are as follows:

3.10 The arbitral awards demonstrate that, in the arbitral procedure, parties debated extensively about the valuation of the LPG installation and about the amount of compensation to be determined based on that valuation. According to the arbitral awards in that procedure, Stati et al. took the position that the installation should be valued according to the expected Discount Cash Flow (DCF) which their expert valued at USD 408,3 million. According to them, the scrap value was incorrect indemnification for the LPG installation taken into possession by Kazakhstan, which Kazakhstan wanted to operate at full capacity. In any case, Stati et al. wanted to see a return on their investment costs and, additionally, the value (or some of it) they would have realized upon commissioning the LPG installation for processing the "Contract 302" gas. Stati et al. budgeted their investments until July 2009 at USD 245 million, and the expected value at commissioning for the "Contract 302" gas on USD 329 million, so that the expected value at commissioning exceeded the costs with an amount of USD 84 million. Stati et al. also pointed out that they could have sold the LPG installation to a third party which could have used the LPG installation to process its own gas. In relation to this, they pointed out KMG's fictitious offer of USD 199 million in September 2008. In the arbitral procedure, Kazakhstan took the position that the LPG installation was a "failed project", and that Stati et al. could therefore not claim any indemnification with relation to that installation; at most a possible scrap value, but that Stati et al. had not made any such claim. According to Kazakhstan, Stati et al. incorrectly referred to the investment value or book value, because this is not a proper indication of the market value. A hypothetical buyer would not be interested in the amount of the investments, but only in the expected revenues. Kazakhstan made reference to the expert, Deloitte, which it had contacted, who concluded that the installation had a negative value of USD 89,9 million. Deloitte based this value on the DCF method, and on the estimated needed costs of USD 100 million in order to finish construction of the LPG installation. Kazakhstan also referenced reports of another expert, GCA (Gaffney, Cline & Associates), which specify that (at least) another USD 100 million would be needed to finish construction and commission the installation. Kazakhstan further pointed out that the bids from KPM and other parties did not represent the FMV (Fair Market Value) because, according to testimonies, those bids were made only for strategic reasons, namely to gain access to the data room. Kazakhstan also contested that it had the intention to finish construction of the LPG installation.

3.11 Based on party debate, the arbitral tribunal considered that it was not convinced by the conclusion of Kazakhstan's experts that the LPG installation was a "failed project". In this case, Kazakhstan would not have been willing to further invest in the finalization of the construction, which was the case according to evidence. The arbitral tribunal further considered that it took note of the parties' elaborate arguments, based on their expert reports, but that it did not have to evaluate those reports and their very different conclusions. In the opinion of the arbitral tribunal, "the relatively best source" for valuation of the installation are the bids placed for that installation by third parties circa October 2008. After all, the potential buyers made bids for the LPG installation with the expectation that it would become operational. Therefore, the arbitral tribunal chose its own method for determining the valuation, for which it appears to have been led by both parties' focus on the

operational value of the LPG installation. The arbitral tribunal did not elaborate on parties' arguments about that operational value, which were mainly focused on the result of valuations by both parties' experts. Instead, from the multiple facts presented by the parties, the arbitral tribunal decided in favour of choosing the bids placed in 2008, namely the bid placed by KMG, as the relatively best source for valuation of the LPG installation. With its choice, the arbitral tribunal demonstrated that it considered the operational value of the LPG installation in economic traffic as decisive. After all, that value is evident from the bids. The arbitral tribunal rejected arguments that these were only strategic bids, and not a price that the bidders were actually prepared to pay. This implies that the arbitral tribunal did not take the investment costs of the LPG installation into consideration when determining the loss. Parties' debate in the arbitral procedure partly concerned the question whether or not the investment costs should be considered for valuation of the LPG installation. The arbitral tribunal chose to disregard the investment costs, which was also the argument put forward by Kazakhstan. The conclusion drawn is that the position taken by Stati et al., namely that they invested USD 245 million in the LPG installation did not influence the outcome of the arbitral procedure.

3.12 In these proceedings, Kazakhstan has further argued that the investment costs that were (fraudulently) indicated via the bids, indirectly influenced the outcome of the arbitral procedure. To this end, Kazakhstan argues that, in the summer of 2008, Stati et al. drafted a so-called information memorandum, for the purpose of selling TNG (among others), in which they stated that, up until 1 July 2008, TNG had invested a sum of USD 193 million in the LPG installation. These costs, too, were deceptively increased in the aforementioned manner, meaning that KMG's bid was obtained through deception. From the bid's text, it is clear that it was partly based on the construction costs indicated by Stati et al. According to Kazakhstan, if this had been known to the arbitral tribunal, it would never have considered KMG's bid as "the relatively best source" for valuation. The court's deliberations regarding this argument are as follows: In its considerations concerning the valuation of the LPG installation, the arbitral tribunal found that the average valuation of the bids for the installation was USD 150 million. Thereafter, the arbitral tribunal referred to the special significance of KM's bid, a company owned by Kazakhstan, for an amount of USD 199 million, and determined the damages payable by Kazakhstan at this amount. The determination of loss was not solely based on KMG's bid, but the arbitral tribunal also took other bids into consideration. These bids were elucidated by bidders' explanations, based on the DCF-method, or no valuation method was described. Additionally, KMG's bid was, according to the accompanying text, only partly based on the construction costs. The value of the LPG installation was calculated as the mathematical average value, based on the operational profit (EBITDA) and the value based on historical costs. The bid of USD 199 million is closest to and even slightly higher than the amount of the construction costs indicated (fraudulently, according to Kazakhstan) at USD 193 million. KMG seems to have estimated the value, based on operational profits, equal to or higher than the construction costs. Therefore, it is not unambiguously clear that the indication of the construction costs in the amount of USD 193 million had any influence on KMG's bid, let alone on the other bids. Furthermore, it is pure speculation to share Kazakhstan's argument that if the arbitral tribunal, knowing that the construction costs were lower than those presented to the buyers, would not have considered the bids as being "the relatively best source" for valuation of the LPG installation. Even then, the arbitral tribunal could have assumed that the potential buyers, and specifically KMG as a Kazakh state enterprise, as informed parties, were the most aware of the (operational) value of the LPG installation. In this context, it is important to note that the arbitral tribunal explicitly rejected Kazakhstan's argument that strategic bids had only been placed in order to gain access to the data room - where bidders could have verified the investment costs. Furthermore, it is not at all apparent that, in the summer of 2008, even before the existence of a dispute between the parties, Stati et al. deliberately created these circumstances so that they could influence the arbitral tribunal in an arbitral procedure that was not yet pending. Kazakhstan did not put forward any arguments that could justify such a conclusion. Moreover, Kazakhstan's argument is refuted by the fact that in the arbitral procedure Stati et al. did make reference to the bids, and the bid of KMG specifically, but did not take the position that the arbitral tribunal should consider those bids as leading when determining loss.

3.13 Furthermore, it is important for the aforementioned valuation that, in the arbitral procedure, Kazakhstan never contested the amount of the construction costs that were indicated by Stati et al. Kazakhstan only took the position that the construction costs indicated by Stati et al. at USD 245 million were irrelevant because the Fair Market Value (FMV) of the LPG installation should be assumed, which, in its opinion, was much lower than the construction costs because the LPG installation would never be profitable. On the contrary, Kazakhstan relied in the arbitral procedure on the report of the expert, GCA, which it had engaged. This expert report states that an estimated investment of USD 320 million is reasonable "for the plant as designed" and, furthermore, that the LPG installation, at the time of the report, was 75-90 percent completed (and, according to Kazakhstan's statements, even 80-90 percent completed). The amount indicated by Stati et al. does, therefore, not significantly deviate from the amount of reasonable costs as indicated by Kazakhstan's expert, taking into account the percentage of completion of the installation as indicated by experts (75 percent of USD 320 million, i.e. USD 240 million). Even if the costs of finalizing the construction, estimated by the expert to be USD 100 million, are deducted, the investment comes to USD 220 million, which likewise does not significantly deviate from the construction costs as indicated by Stati et al. In light of this, there is no reason to believe that Stati et al. deceived the arbitral tribunal in its presentation of the construction costs, let alone that the arbitral tribunal was deceived by those costs. If the arbitral tribunal had based itself on the reasonable costs according to the report of Kazakhstan's expert, it would have assumed similar construction costs.

3.14 In this context it is also important that, at the time of the arbitral procedure, Kazakhstan already had control of the LPG installation and, thus, had insight into the actual condition of the installation. At that moment, Kazakhstan was also in possession of TNG's record-keeping system, which Kazakhstan has not denied. Therefore, Kazakhstan had every opportunity to take a substantiated position in the arbitral procedure concerning the costs already incurred for the LPG installation and, in any case, the costs reasonably incurred. GCA's report also shows that GCA employees did, indeed, inspect the LPG installation, so that there was nothing preventing a substantiated position concerning the costs to be reasonably incurred for the construction project.

3.15 Furthermore, it should be considered that differences of opinion can exist about which costs can be reasonably attributed to the construction of the LPG installation. Positions taken in this context can, therefore, not automatically be considered as deception if these later prove to be (partially) incorrect. In this case, however, there was no disagreement in the arbitral procedure regarding the amount of the costs reasonably to be charged. This further means that the statements made by Stati et al. in the arbitral procedure cannot easily be regarded as deceptive. From the statements made by Kazakhstan in the aforementioned procedure concerning the claimed deception, and from submitted documents in relation to wit, it could be deduced that TNG, the shares of which were, at that time, owned by Stati et al., made payments to Perkwood and Azalia, other entities connected to Stati et al., while there was no clear factual or legal basis for those payments. This, however, does not mean that procedural deception was committed, as claimed by Kazakhstan. This claim is refuted simply by the fact that there is no proof that these payments were made with the intention of deceptively inflating the value of the LPG installation in the arbitral procedure. And in any case, this cannot hold true for those costs that were actually incurred and indicated in the Information Memorandum provided to the bidders. After all, these costs had already been incurred and entered in TNG's record-keeping system before the existence of a dispute between parties. Additionally, it has not been ascertained with sufficient certainty that costs were intentionally indicated for parts which were unnecessary or not delivered. In the current proceedings, Stati et al. have refuted with reasons that parts were fictitiously indicate or that parts were not supplied; and in this context, Kazakhstan, too, has not put forward any circumstances which would suggest intentional actions by Stati et al. in relation to the arbitral procedure. That such could be regarded as deceptive transactions, in the sense that Stati et al. indicated costs which could not reasonably be attributed to construction of the LPG installation, is contradicted by the findings of Kazakhstan's expert, who does not substantially contest the total amount indicated by Stati et al. The fact that these costs - intentionally or unintentionally - were not

entered or incorrectly accounted for in the record-keeping systems of the various entities connected to Stati et al., as suggested by Kazakhstan, is irrelevant in connection with these proceedings. The amounts which Kazakhstan alleges are fraudulently indicated by Stati et al., together amount to more than USD 200 million. That, too raises questions about the deception Kazakhstan alleges took place. The amount which, after deduction of those allegedly deceptive costs, would remain as actual investment costs, USD 45 million at most, is not at all congruent with the reality as ascertained by Kazakhstan's expert. This, too, makes it less likely that costs were indicated fraudulently.

3.16 Taking the prior into consideration, it must also be remarked that Stati et al.'s silence concerning the connection between themselves and the entities Perkwood and Azalia should be considered deception, as Kazakhstan posits. Because it has not been found that payments by TNG to these entities can be regarded as deceptive, it is no longer relevant whether or not these parties were connected to Stati et al. and neither can the omission of this information (which is disputed by Stati et al.) be called procedural deceit, either. Therefore, the court will not consider the debate between parties about this subject.

3.17 The prior means that, in relation to the valuation of the LPG installation, no facts or circumstances of such gravity were shown that the arbitral awards should not be given legal effect. It has not been ascertained that Stati et al. have intentionally misled the arbitral tribunal, nor that the alleged misleading was of substantial influence on the formation of those arbitral awards.

Deception concerning liquidity shortage

3.18 In its defence, Kazakhstan argued that the arbitral tribunal seemed to attribute the liquidity shortage of TNG and KPM to its (Kazakhstan's) actions, while that liquidity shortage could very well be the result of the previously mentioned fictitious construction costs of the LPG installation. According to Kazakhstan, this could have caused the arbitral tribunal to arrive at a different conclusion regarding the causal relationship between its conduct and the loss alleged by Stati et al. The court does not agree with this argument, if only because it has not been proven that any construction costs were indeed fraudulently altered. Given the multitude of facts considered by the arbitral tribunal in its conclusion about the causal relationship between Kazakhstan's conduct on the one hand and the loss claimed by Stati et al. on the other hand, the argument that the arbitral tribunal would have arrived at a different conclusion about that causality if fraudulent construction costs had been demonstrated during the arbitral procedure, is no more than speculation.

3.19 In its submission filed after the interim ruling, Kazakhstan also argued that having studied the newly produced evidence, it appeared that Stati et al. had deceived the arbitral tribunal in relation to the cause of its liquidity shortage, about the attempt to secure a loan from Credit Suisse, and about the so-called "Laren transaction". This transaction, which took place in June 2019, meant that Tristan Oil would deliver bonds to Laren Holding (hereafter: "Laren"), that Laren would transfer these bonds to lenders who would issue a USD 60 million to Laren, with which the bonds would be paid, and a loan of USD 30 million would be issued to TNG and KPM. The nature of the alleged deception was that the documents currently obtained, namely record of board meetings from Ascom of 14 and 22 October 2008, an email from Standard Bank of 25 November 2008 and an internal email of 11 December 2008, show that Stati et al. had a liquidity shortage of USD 50 million, in relation to their activities in Kazakhstan, expected a liquidity shortage in the first half of 2009 and sought financing, and that the obtained internal email of 11 December 2008 shows that Stati et al. found Credit Suisse's loan too expensive and restrictive. Furthermore, a newly obtained settlement agreement shows that Laren was connected to Stati et al., and newly obtained email correspondence between Fitch Ratings

and Stati et al. shows that Stati et al.'s actions (partially) had Fitch Ratings downgrade the credit rating of the bonds issued by Tristan Oil. Lastly, newly obtained documents show that Stati et al. were actively involved in the negotiations in relation to the Laren transaction, and that they successfully negotiated beneficial conditions for themselves, while they argued in the arbitral procedure that they had to accept the Laren transaction under very disadvantageous conditions. According to Kazakhstan, if the arbitral tribunal had been aware of the newly obtained documents, it would have arrived at a different conclusion concerning the causal relationship between Kazakhstan's conduct and the loss alleged by Stati et al.

3.20 Stati et al. subsequently responded as follows. In the arbitral procedure, they never claimed that Kazakhstan was to blame for their liquidity problems of late 2008, nor that Kazakhstan's actions was the only cause of their liquidity problems. The documents referenced by Kazakhstan were therefore not relevant to the dispute in the arbitral procedure. Stati et al. also submitted and elucidated the "term sheet" of 5 December 2008, with the conditions imposed by Credit Suisse on the loan, so that Kazakhstan (and, as the court understands, also the arbitrators) could independently evaluate the conditions of that loan. Kasumov, who indeed acted on their behalf, also signed the settlement agreement on behalf of Laren. Stati et al. argues that this settlement agreement does not prove that Laren was connected to them. Stati et al. also argue that they submitted Fitch's explanation of the credit rating in the arbitral procedure, in which the same points were indicated as in the email correspondence referenced by Kazakhstan. Therefore, there was no reason to submit this correspondence in the arbitral procedure. In conclusion, Stati et al. point out that they submitted the final documents in relation to the Laren transaction. Therefore, they had not withheld any agreed upon condition. Stati et al. explained that, at the time of the arbitral procedure, they had nothing to gain from the, as claimed by Kazakhstan, advantageous conditions, because they had defaulted on the loan, causing these advantageous conditions to become void.

3.21 During continuation of the oral hearings (as mentioned under 1), Kazakhstan did not respond to the facts in Stati et al.'s previously mentioned argument, leading the court to take these to be true. The court also agrees with Stati et al. in their conclusion that the documents now referenced by Kazakhstan were not relevant in the arbitral procedure, or that it was at least reasonable of Stati et al. to make this assumption. Those facts also lead to the conclusion that Stati et al. submitted at all times the most relevant documents in the arbitral procedure for the purpose of an opinion on the dispute. It has not been shown that Stati et al. intentionally withheld documents in order to damage Kazakhstan's position. The fact that the documents mentioned by Kazakhstan were missing, cannot be seen as of such gravity that this should be regarded as procedural deception.

3.22 To wit, the following should be considered. Stati et al. have, rightfully, pointed out that, as considered by the arbitral tribunal in the arbitral award under 349, Credit Suisse, as a result of a press release by INTERFAX, notified Stati et al. that it would not issue a loan to Stati et al. until Stati et al. had settled their dispute with Kazakhstan. In Paragraph 994 of that award, the arbitral tribunal concludes that it is evident that this press release was published by Kazakhstan or as a result of Kazakhstan's actions, which Kazakhstan does not contest. In Paragraph 1416, the arbitrators explain that Kazakhstan's "aggressive and forced actions, including the inspections, the criminal charges, and the asset seizures" forced Stati et al. to accept the "horrendous" conditions of the Laren transaction. Under Paragraph 1618, the arbitrators furthermore consider that, after an evaluation of "the timeline of events", they concluded that Kazakhstan's actions, which had already been found to be in violation of the ECT, including the liquidity shortage to the extent it was caused by Kazakhstan, forced Stati et al. to reduce its efforts to develop the Borankoland Tolkyn oil fields. In light of these considerations, Kazakhstan has not sufficiently explained how the documents it referenced could be of substantial value with regard to the arbitral tribunal's opinion regarding the causal relationship between Kazakhstan's conduct and Stati et al.'s loss. After all, these documents do not relate to the core of the

conduct that Kazakhstan is accused of, which the arbitral tribunal considers to have resulted in the loss.

3.23 This leads to the conclusion that no procedural deception can be ascertained in relation to the liquidity shortage.

Other deception

3.24 Kazakhstan appears to assume (defence submission, under 95) that the arbitral tribunal's decision to award damages in the amount of USD 31 million for investment costs relating to "Contract 302 Properties", was arrived at by means of deception. Kazakhstan claims that costs in TNG's annual reports were fraudulently altered. However, Kazakhstan has failed to demonstrate this, leading the court to ignore this argument.

Other grounds for refusal

3.25 Finally, Kazakhstan argued that recognition and enforcement must be refused based on the fact that: (a) the arbitral tribunal was not composed in compliance with the applicable rules (Article V(1)(d) of the New York Convention, or Article 1076(1)(a)(b) Rv); (b) it was not given proper notice of the appointment of the arbitrator assigned to its case (Article V(1)(b) New York Convention); and (c) there was no valid agreement of arbitration or the conditions for arbitration were violated (Article V(1)(a) and (c) New York Convention, or Article 1076(1)(A)(a) Rv). According to Kazakhstan, these grounds, considered individually or as a whole, form grounds for refusing the application made by Stati et al.

3.26 In relation to ground (a), Kazakhstan points out the following. Article 13 of the Stockholm Chamber of Commerce Arbitration Rules 2010 (hereafter called "the SCC Rules") determines that if a party neglects to appoint an arbitrator within "the stipulated time period", the board of the SCC shall do so. According to Kazakhstan, the board of the SCC thus appointed the arbitrator Lebedev, without having the authority to do so, seeing the board had not indicated a deadline by which an arbitrator had to be appointed.

3.27 As also depicted by Kazakhstan, the following took place. By letter of 5 August 2010, received on 9 August 2010, the secretariat of the SCC sent Stati et al.'s application for arbitration to Kazakhstan and, in accordance with Article 5 of the SCC Rules, requested submission of a response by 26 August 2010 at the latest. Then the secretariat sent a reminder, by letter of 27 August 2010, received on 31 August 2010, and extended the time period for submission of a response to 10 September 2010. It has been found that Kazakhstan did not respond within the deadlines set by the SCC. Kazakhstan questions whether or not deadlines were set in accordance with Article 13 of the SCC Rules. The court believes this to have been the case. Article 5 of the SCC Rules, to which the SCC's letter of 5 August explicitly refers, determines that the response shall include the name and further information of the arbitrator appointed by the defending party. The deadline imposed on Kazakhstan for submission of a response should therefore, and contrary to Kazakhstan's argument, also be regarded as the deadline by which Kazakhstan, as the defending party, had to appoint an arbitrator. The situation in which a party, Kazakhstan, did not appoint an arbitrator by the deadline, actually did exist. Therefore, after expiry of the deadline, the board of the SCC was authorized to appoint an arbitrator itself, which it did in the person of Lebedev, on 15 September 2010.

3.28 The above consideration is not altered by the fact that on 13 September 2020, Stati et al. requested the board of the SCC to appoint an arbitrator on behalf of Kazakhstan and that Kazakhstan, because it only learnt of that request on 23 September 2010, was unable to respond to that request before the appointment of Lebedev. This is because, according to Article 13 of the SCC Rules, the board of the SCC was already authorized to appoint an arbitrator as soon as the deadline for Kazakhstan to appoint an arbitrator had passed. It must be held that the board of the SCC appointed an arbitrator because of Kazakhstan's failure to appoint an arbitrator, and not because Stati et al. made a request to appoint one. In any case, Stati et al.'s request is not the basis for the board's authority to appoint an arbitrator and for that reason, just like Kazakhstan's inability to provide a timely response, is irrelevant in this regard.

3.29 Contrary to Kazakhstan's argument, the series of events as depicted above does not lead to the conclusion that Kazakhstan was not given proper notice of the appointment of the arbitrator Lebedev. After all, Kazakhstan received a message from the SCC about the appointment on 27 September 2010, shortly after the appointment. It cannot be seen why this should be considered too late or not proper notice. Kazakhstan's inability to respond to the request of Stati et al. does not change this.

3.30 Nor is it relevant that the SCC Rules state that the nature and circumstances of the dispute should be taken into account. According to Kazakhstan, the board of the SCC should have taken into account that decision-making within a government is prone to certain lassitude, that Kazakhstan had to have the documents translated and that it had not yet appointed an attorney for the arbitral procedure. The court does not agree with these arguments, because these circumstances should, in principle, be for the account and risk of Kazakhstan as a professional party. If Kazakhstan had deemed the deadlines too short for submission of a full response, indicating the name of the arbitrator it wished to appoint, Kazakhstan could also have requested an extension of the deadline for submission of a (full) response. It did not do this, also not immediately after being informed on 27 September of the appointment of arbitrator Lebedev. Kazakhstan firstly responded to the letters and documents sent to them by letter sent by its attorney, on 8 November 2010, in which letter it merely requested to be sent the case file. Only on 2 December 2010 did Kazakhstan file an objection against the appointment of Lebedev. In these proceedings, no grounds can be discerned for the SCC to reasonably exempt Kazakhstan from the deadlines that the SCC had set.

3.31 Kazakhstan also relies on Stati et al. not respecting the cool-down period of 3 months as stated in Article 26(2) of the ECT. According to Kazakhstan, the arbitral tribunal therefore lacked competence to hear the dispute. Stati et al. dispute non-compliance with the cool-down period. Whatever may be, non-compliance with the cool-down period does not result in the arbitral tribunal lacking competence. The text of the ECT does not provide sufficient grounds for such a far-reaching conclusion. On the contrary, under Article 26(3), Kazakhstan has given its unconditional consent to the submission of a dispute to international arbitration. Kazakhstan's conclusion that there was no valid agreement for arbitration, or that the conditions under which arbitration is possible were violated, is not shared by the court.

3.32 Furthermore, Kazakhstan has not contested that prior to arbitration and on multiple occasions, Stati et al. had pointed out to Kazakhstan the disputes which had arisen between parties. Kazakhstan has likewise not contested that the arbitral procedure was suspended for the purpose of complying with the required cool-down period. In relation to these uncontested circumstances, Kazakhstan has not elucidated whether and how these circumstances disadvantaged it. Insofar as Kazakhstan argues that it would have had sufficient time to appoint an arbitrator if the cool-down period had been respected, the court again points out that Kazakhstan neglected to request an extension of the given

time period for appointment of an arbitrator. Furthermore, the purpose of the cool-down period is not to give parties time to prepare for an arbitral procedure, but to prevent the need for such a procedure by way of reaching an amicable settlement. In this case, that purpose is served by other means.

3.33 Considering the aforementioned circumstances as a whole does not form grounds to refuse the current application.

Violation of duty of truth

3.34 In its written submission filed after the interim ruling, Kazakhstan argued that in these court proceedings, Stati et al. had acted in violation of the duty of truth ex Article 21Rv. During the initial oral hearing, Stati et al. allegedly took positions which were irreconcilable with documents from their very own record-keeping system. The application for recognition and enforcement should be refused on those grounds, too. Stati et al. contest that they violated Article 21 Rv and furthermore argue that violation would not be separate grounds for refusal.

3.35 The court considers that grounds for refusal of an application, such as the present, are stated in a limitative manner in the New York Convention. These do not include violation of Article 21 Rv. This argument of Kazakhstan must likewise be ignored. The arguments of Kazakhstan regarding that violation also relate to the same matter as the alleged deception by Stati et al. in the arbitral procedure. The court has already given its opinion on that above.

Application ex Article 843a Rv

3.36 In its written submission filed after the interim ruling, Kazakhstan communicated that it wished to maintain its application to the court by letter of 15 May 2018, for copies of the following documents:

- agreements regarding the management fee paid to Perkwood and documents showing the services supplied for these fees, and

- agreements between Azalia and Perkwood regarding construction of the LPG installation, including the purchase and delivery of specifically specified parts.

3.37 Partly in light of the prior considerations regarding the deception alleged by Kazakhstan regarding the costs of the LPG installation, and more specifically the costs that were indicated regarding the management fee and delivered parts, the court fails to see why Kazakhstan would have a legitimate interest in inspecting the aforementioned documents. In any case, Kazakhstan did not convince the court of any specific legitimate interest.

3.38 The same applies to Kazakhstan’s supplementary request for inspection of the agreement between Azalia and Hayden, among which the agreements “for drilling equipment” and “for LPG equipment”. Kazakhstan did not sufficiently specific indicate its interest relevant to these documents, in light of the prior considered.

3.39 Kazakhstan also requests a copy of, or inspection of, all documents not submitted in the English proceedings. To that end, it argues as follows. Stati et al. reported to the High Court that they identified a total of 130,000 documents which are eligible for disclosure. However, they submitted only 70,000 documents. They neglected to properly follow the order for disclosure of the other documents.

Stati et al. dubiously refused to submit half of these documents, likely because the other documents were deemed confidential or irrelevant. Subsequently, Stati et al. terminated the English proceedings for recognition before a decision had been taken with regard to the application for enforcement. The court considers that, in these Dutch proceedings, these matters do not sufficiently motivate the court to order Stati et al. to provide or give access to these documents. To this end, Kazakhstan should have concretely motivated its legitimate interest, in accordance with Article 843a Rv. Kazakhstan failed to do so properly, or sufficiently specifically, so that there are no grounds for the court to grant this application.

3.40 Kazakhstan also points out a “specific disclosure” in the English proceedings which Stati et al. supposedly did not honour. Kazakhstan claims that these documents demonstrate the alleged fraudulently increased prices of delivered parts. With regard to these documents, Kazakhstan again failed to sufficiently elucidate its legitimate interests.

In conclusion

3.41 Because there appears to be no ground for refusing the application made by Stati et al. relative to Kazakhstna, the court allows the application. Kazakhstan’s application based on Article 843 Rv is refused. As the unsuccessful party, Kazakhstan is hereby ordered to pay the legal costs of Stati et al. As a result, Kazakhstan’s application to order Stati et al. to pay the actual legal costs has been refused, due to lack of sufficiently convincing legal grounds. In the interim ruling, it has already been considered - on the therein mentioned grounds - that this application be refused insofar as it was directed against National Fund and Samruk. As the unsuccessful party, Stati et al. will be ordered to pay the legal costs of Samruk and National Fund.

3. Decision

The court:

recognizes and grants leave of enforcement in the Netherlands of the arbitral awards handed down in Stockholm, Sweden, on 19 December 2013 and 17 January 2014;

refuses Kazakhstan’s application ex Article 843a Rv;

refuses the application of Stati et al. insofar as this is directed against Samruk;

refuses the application of Stati et al. insofar as this is directed against National Fund;

orders Kazakhstan to pay Stati et al.’s legal costs of these proceedings and estimates these costs to date at € 716 in advances and € 3,222 in salaries;

orders Stati et al. to pay Samruk’s legal costs of these proceedings and estimates these costs to date at € 726 in advances and € 3,222 in salaries;

orders Stati et al. to pay National Fund's legal costs of these proceedings and estimates these costs to date at € 726 in advances and € 3,222 in salaries;

This ruling has been pronounced by *meester* D. Kingma, *meester* W.H.F.M. Cortenraad and *meester* A.M.A. Verscheure, and was publicly pronounced by the calendar hearing judge on 14 July 2020.

***meester* A.R. Sturhoofd**

[signature] [signature]