23 August 2020

Anatolie Stati et. al.

v.

Republic of Kazakhstan

LEGAL OPINION

A. INTRODUCTION

1. The Republic of Kazakhstan ("**RoK**") has asked me to provide an opinion on certain issues in the above-referenced matter.

2. I have been asked to address in this Opinion the following questions under Swedish law:

    - Is there a duty of candour and duty to tell the truth of parties and counsel in civil proceedings in Sweden?
    - Have the Stati Parties breached those duties in civil proceedings in Sweden?
    - Have the Swedish courts found that the Stati Parties did not commit fraud, money laundering and/or bribery of public officials?
    - Does the relevant arbitral award or its enforcement in Sweden violate Swedish public policy?

3. Translations are my own except where otherwise stated.

B. DOCUMENTS

4. RoK has provided me with the following documents:

    - Decision of the Svea Court of Appeal, refusing to set aside the arbitral award, dated 9 December 2016;
    - Judgment of Mr Justice Knowles of the High Court of England and Wales finding "prima facie evidence" of fraud dated 6 June 2017;
    - Decision of the Swedish Supreme Court to refuse Kazakhstan's application for grave procedural error dated 24 October 2017;
    - Witness Declaration of Alexander Foerster of Mannheimer Swartling, the Swedish counsel of Kazakhstan, dated 10 May 2019;

- Witness Declaration of Matthew Kirtland of Norton Rose Fulbright, the US counsel for Kazakhstan, dated 9 May 2019;
- Kazakhstan's second invalidation claim based on new evidence and new claims dated 25 November 2019;
- Legal Opinion of Professor Christoph Schreuer dated 21 January 2020;
- Legal Opinion of Professor George Bermann dated 21 January 2020;
- Expert Opinion of PricewaterhouseCoopers LLP dated 21 January 2020;
- Decision of the Svea Court of Appeal dismissing Kazakhstan's second invalidation claim on the basis of res judicata dated 9 March 2020;
- Kazakhstan's petition to re-open the Swedish set-aside proceedings on the basis of new evidence dated 3 April 2020;
- Decision of the Swedish Supreme Court refusing to re-open the Swedish set-aside proceedings dated 18 May 2020;
- Decision of the Amsterdam Court of Appeal in the exequatur proceedings dated 14 July 2020;
- Second Witness Declaration of Alexander Foerster of Mannheimer Swartling, the Swedish counsel of Kazakhstan dated 20 July 2020;
- Expert Opinion of Alexander Layton QC on the outcome of the English enforcement proceedings dated 27 July 2020.

5. I should add the following. Since late 2016, I have at irregular intervals assisted counsel to the RoK in this matter, notably with an expert report to the English High Court dated 13 January 2017. I have been provided with many other documents in so doing.

C. BACKGROUND AND QUALIFICATIONS

6. I am – until 24 August 2020 when I will resume my position as a Judge at the Svea Court of Appeal – an independent arbitrator and legal adviser. I am also an Associate Professor (*Docent*) of Law at the Stockholm University Faculty of Law (but not employed).

7. Arbitration has been my main field of specialization for over thirty years. I have a doctorate in arbitration law (dissertation 1998, The Arbitrator's Mandate). During my time in private practice as a member of the Swedish Bar, I acted as counsel in arbitrations and in court actions for setting aside arbitral awards. I have sat as an arbitrator (party-appointed, chairman and sole arbitrator) in many domestic and international arbitrations, ad hoc as well as institutional.

8. I was a Judge of Appeal at the Svea Court of Appeal 2008 – 2019, when I resigned (having been on temporary leave for three years). I have been on the bench in many arbitration cases. For five years I was assigned to the only division in the Svea Court that hears arbitration cases. Having left the Court, I eventually found that I missed the

variation and teamwork. I have now once again been appointed a Judge of Appeal in the Svea Court of Appeal.

9. My CV is attached.

D. MY OPINION IN SUMMARY

10. This is my opinion in summary:

- Yes, there is there a duty of candour and a duty to tell the truth of parties and counsel in civil proceedings in Sweden. Withholding relevant information counts as not telling the truth. The duty of truth also includes an obligation to actively promote the investigations of the circumstances of the case. A party representative is subject to the same duty of truth.
- Yes, the Stati Parties have breached those duties in civil proceedings in Sweden.
- No, the Swedish courts have not found that the Stati Parties did not commit fraud, money laundering and bribery of public officials.
- Yes, the relevant arbitral award and its enforcement in Sweden violate Swedish public policy. This is because the award is based on false evidence.

E. SUMMARY OF FACTS

11. In 2010, Anatolie Stati, Gabriel Stati, Terra Raf Trans Trading Ltd. and Ascom Group S.A (the "**Stati Parties**") initiated investor-state arbitration under the Energy Charter Treaty (the "**ECT Arbitration**") against the RoK. On 19 December 2013, (corrected on 17 January 2014) the arbitral tribunal (the "**Tribunal**") issued the arbitral award, granting the Stati Parties damages in an amount of approx. $500 million relating to the Liquefied Petroleum Gas Plant (the "**LPG Plant**") and oil fields (the "**Award**").

12. Of the awarded amount, $199 million was compensation for the LPG Plant. That was the LPG's Plant's value according to an indicative bid (the "**Indicative Bid**") by a third party.

13. For the purposes of this Opinion, I will proceed on the assumption that the Stati Parties in the ECT Arbitration intentionally misled the Tribunal concerning the value of the LPG Plant, as I believe that there exists credible evidence towards this fact.

14. That belief is based on the views stated and the facts presented in following material:

- The Judgment of Mr Justice Knowles of the High Court of England and Wales finding "prima facie evidence" of fraud dated 6 June 2017 (the "**Knowles Judgment**");
- The Expert Opinion by Alexander Layton QC dated 27 July 2020 (the "**Layton Opinion**");

- The Legal Opinion of Professor Christoph Schreuer dated 21 January 2020 (the "**Schreuer Opinion**");
- The Legal Opinion of Professor George Bermann dated 21 January 2020 (the "**Bermann Opinion**"); and
- The Expert Opinion of PricewaterhouseCoopers LLP dated 21 January 2020 (the "**PWC Opinion**").

15. I have found no reason to question this material. I will thus proceed on the assumption that the Indicative Bid on which the Tribunal relied for the valuation of the LPG Plant was obtained with, in Professor Bermann's words, "fraudulent financial reporting and fraudulently obtained audit reports" by the Stati Parties.[1]

1. The Swedish Annulment Proceedings (2015 to 2016)

16. The RoK requested the Svea Court of Appeal (the "**Svea Court**") in Sweden to annul the Award, inter alia on the ground that the Award violates Swedish public policy (the "**Swedish Annulment Proceedings**").[2]

17. The Svea Court decided to not annul the Award in its judgment of 9 December 2016 (the "**2016 Decision**").

2. The 2017 Extraordinary Petition to the Swedish Supreme Court

18. The Svea Court excluded the possibility to appeal the 2016 Decision, which therefore became immediately final. On 3 February 2017, the RoK therefore petitioned the Swedish Supreme Court by way of an extraordinary measure, to set aside the 2016 Decision and send the case back to the Svea Court for further consideration.[3] The Swedish Supreme Court was not asked to review the case on the merits.

19. On 24 October 2017, the Swedish Supreme Court rejected the RoK's petition, stating that the RoK had not shown any circumstances that constitute a grave procedural error.[4]

3. Discovery of New Evidence after the Swedish Annulment Proceedings

20. I understand that after the conclusion of the Swedish Annulment Proceedings, the RoK was able to discover more evidence of fraud. This discovery of new evidence came in

[1] The Bermann Opinion, para. 46.
[2] For the purposes of this Opinion, I need not deal with the two forms of "annulment" of arbitral awards under Swedish law (declaring an arbitral award void or setting it aside).
[3] The RoK's Motion to Vacate dated 3 February 2017, para. 4.
[4] The Swedish Supreme Court's Decision dated 24 October 2017, p. 2.

stages starting from the summer of 2015 and is still going on. The new set of evidence comprises the following:

a. The representation letters containing false representations signed by Anatolie Stati and then sent to his companies' auditors KPMG Audit LLC ("**KPMG**"), containing false representations obtained in June 2018.[5]

b. Testimony under oath of the Stati Parties' former Chief Financial Officer, Mr Artur Lungu in the United States on 3 April 2019 ("**Lungu Deposition**") where Mr. Lungu confirmed materially false representations made to KPMG.[6]

c. As a result of the Lungu Deposition, on 21 August 2019, KPMG informed the RoK that it had invalidated all of its audit reports issued for the Stati Parties' companies' financial statements for the full relevant period ("**Financial Statements**"). KPMG also informed the RoK that it requested the Stati Parties to *"take all steps necessary to prevent any further or future reliance"* on its audit reports.[7]

d. On 25 October 2019, the RoK obtained access to the correspondence between the Stati Parties and KPMG that took place in two separate time frames (the "**KPMG Correspondence**")[8]:

- *February – March 2016:* During the pendency of the Swedish Annulment Proceedings KPMG raises a number of audit related concerns, questioning the accuracy of the financial information in the Financial Statements. KPMG explicitly noted that the position submitted at that moment by the Stati Parties to the Svea Court was in contradiction to the representations made by the Stati Parties to KPMG. This correspondence was not known to the RoK or to the Svea Court during the Swedish Annulment Proceedings.
- *August – October 2019*: KPMG informs the Stati Parties that it had invalidated their audits because of materially false information obtained from the Stati Parties. The Stati Parties tried to get KPMG to revoke its invalidation of the audits; KPMG did not do so.

e. Bank account statements of dozens of the Stati Parties' companies from the Latvian Rietumu Bank (the "**Rietumu Bank Documents**") were obtained in the summer of 2019 and reveal secret diversions of funds and payment

[5] The PWC Opinion, paras. 6 and 39.
[6] The Declaration of Matthew H. Kirtland dated 9 May 2019.
[7] Letter from KPMG to Herbert Smith Freehills LLP dated 21 August 2019.
[8] The PWC Opinion, paras. 21-27.

of what seems to be bribes to politically exposed people in Kazakhstan, South Sudan, Congo, Moldova, Romania and Kurdistan.[9]

21. None of this evidence had been before the Svea Court in the Swedish Annulment Proceedings nor was it known at the time to the RoK or disclosed by the Stati Parties.

4. Attempts to Introduce the New Evidence in Sweden

22. As the new evidence emerged, the RoK attempted to bring this to the attention of the Swedish courts in three different attempts, each of which that I briefly summarize below.

i. The 2019 Invalidation Claim

23. On 25 November 2019, on the basis of the Rietumu Bank Documents, the RoK once again requested the Svea Court to annul the Award ("**2019 Invalidation Claim**"). The request was focused on new discovered alleged facts of corruption and procedural deceit of the Tribunal by the Stati Parties and supported by documentary evidence.[10]

24. On 9 March 2020, the Svea Court dismissed the RoK's request for reasons of res judicata; the Svea Court held that the same matter (the annulment of the Award) between the same parties had already been decided by the 2016 Decision.[11]

25. There had been no exchange of written or oral statements on the substance of the invoked evidence. The Svea Court did not deal with the merits of the RoK's request. By requesting the Svea Court to dismiss the 2019 Invalidation Claim, the Stati Parties effectively opposed the assessment of the new evidence.

ii. The 2019 Public Policy Ground in the Swedish Attachment Proceedings

26. On 25 November 2019, the RoK petitioned the Svea Court to admit the new evidence of the Stati Parties' fraud in then pending Swedish attachment proceedings, seeking to lift the attachment orders on the basis of public policy considerations.

27. On 3 February 2020, the Svea Court dismissed the petition on procedural grounds. There had been no exchange of written or oral statements on the merits of the invoked evidence. The Stati Parties opposed the admission of the new evidence.[12]

iii. The 2020 Reopening Petition to the Swedish Supreme Court

28. On 3 April 2020, on the basis of the evidence derived from the KPMG Correspondence and the Lungu Deposition, the RoK requested the Swedish Supreme Court to reopen the

[9] The Declaration of Alexander Foerster dated 20 July 2020, para. 13.
[10] Kazakhstan's second invalidation claim based on new evidence and new claims dated 25 November 2019. See also the Declaration of Alexander Foerster dated 20 July 2020, paras. 13-14.
[11] Decision of the Svea Court of Appeal dismissing Kazakhstan' second invalidation claim on the basis of res judicata dated 9 March 2020.
[12] The Declaration of Alexander Foerster dated 20 July 2020, paras. 32-35.

Swedish Annulment Proceedings on the basis of the newly obtained evidence (the "**Reopening Petition**").[13]

29. On 18 May 2020, the Swedish Supreme Court dismissed the RoK's Reopening Petition with a two-sentence decision.[14] There had been no exchange of written submissions and no oral pleadings on the substance of RoK's fraud allegations in the Reopening Petition and the underlying evidence.[15]

F. DUTY OF CANDOUR AND DUTY TO TELL THE TRUTH OF PARTIES AND COUNSEL IN CIVIL PROCEEDINGS

30. Swedish law requires candour and truthfulness of parties and counsel in civil court proceedings. The Code of Judicial Procedure – which is the main body of rules for court proceedings – is designed to promote and result in materially correct judgments based on correct facts. Some aspects of that design are presented below together with other mechanisms geared to achieve the same end.

31. There is a general duty o*f a party* to civil proceedings to tell the truth. There is an express provision to that effect:

> *"A party shall truthfully account for the circumstances on which he relies and comment on the circumstances invoked by the other party, as well answer questions put to him*."[16]

32. A leading commentary – in fact *the* leading commentary – has this to say about what the provision requires of a party and its representatives:

> *"A party to civil proceedings […] is under a duty to tell the truth. He may thus not intentionally supply information regarding the circumstances in the case or against better knowledge deny those supplied by the other party. The duty of truth includes also an obligation of the party to promote actively, by giving information, the investigation of the circumstances of the case to the extent that is needed with respect to the other party's rights. A party must thus, when required by the court or the other party, truthfully and comprehensibly comment those circumstances even if detrimental to the party. A party representative would be subject to the same duty of truth."* [17]

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[13] Kazakhstan's petition to re-open the Swedish set-aside proceedings on the basis of new evidence dated 3 April 2020.

[14] Decision of the Swedish Supreme Court refusing to re-open the Swedish set-aside proceedings dated 18 May 2020.

[15] The Declaration of Alexander Foerster dated 20 July 2020, para. 38.

[16] Chapter 43, section 6(1) of the Code of Judicial Procedure.

[17] Fitger el. al., Rättegångsbalken m.m. (JUNO, 27 maj 2020) at 43:6, where it is also said that the duty of truth is owed during the whole of the proceedings although the provision formally concerns only the main hearing.

33. A *witness under oath* must tell the truth. A breach of this duty is a criminal offense (perjury). Withholding relevant information counts as not telling the truth. For example, a witness who falsely denies having seen someone do something (such as hitting a person or taking an object) is guilty of perjury. Witnesses must, with a few narrow exceptions, swear an oath to tell "the whole truth, and not to conceal, add or change anything".[18]

34. The duty of a witness under oath to tell the truth lives on even after testimony has been given. A witness who has testified in good faith, but later finds out that he was mistaken, must correct the mistakenly given information where there is a risk that another person otherwise would suffer considerable detriment without any lawful grounds, for example lose a civil case of some importance. Breaching this duty is a criminal offense called *failure to avert a judicial error* (Chapter 15, section 9 of the Criminal Code). The idea is to put pressure on witnesses to correct possibly detrimental information before it causes damage. A witness may avoid breaching the duty by informing the party concerned. A final decision in the case where the witness has testified does not necessarily mean that the witness is relieved of the duty; it may continue to exist if the case can be reopened.[19]

35. *Members of the Swedish bar* may not– in court or elsewhere in their practice – state anything they know is not true. Sanctions may be inflicted on them if they do; as an ultimate sanction they may be disbarred.

G. DUTY NOT TO LITIGATE "AGAINST BETTER KNOWLEDGE" (ABUSE OF PROCESS)

36. It is a criminal offense for a *party* – as well as a *party representative* and *counsel* – to initiate a civil action in court or cause one to be initiated, in literal translation, "against better knowledge".[20] "Party" means both the claimant and the respondent. For example, a criminal sanction has been inflicted on a respondent debtor who denied the debt although he obviously knew he had incurred it.[21] I have myself, as a judge, inflicted this sanction a few times.

37. This sanction may however only be inflicted in the relevant ongoing action. Once the case has come to an end, this sanction may not be inflicted.

H. PROCEDURAL FRAUD AND CRIMINAL FRAUD

[18] I use the terms "witness" and "perjury" although there are some distinctions in Swedish law. See Chapter 15, sections 1-3 of the Criminal Code.
[19] Johansson et al., Brottsbalken m.m. (JUNO, 6 maj 2020) at 15:9 for the whole paragraph.
[20] Chapter 9, sections 1 and 4, of the Code of Judicial Procedure.
[21] NJA 1950 p. 526 and NJA 1967 p. 348.

1. Court proceedings

38. "Procedural fraud" is not a concept used in Swedish law. There is no doubt, however, that a person can commit a criminal fraud (or attempted criminal fraud) by bringing and pursuing a case against another person. In other words, a case brought in court can satisfy the conditions for "regular" (attempted) criminal fraud. Nor is there any doubt that party representatives and counsel may be guilty of this crime as notably perpetrators or accomplices. Relevant case law seems to be virtually non-existent; from the past decades I have found only one case where a person was convicted of attempted tax fraud – which in essence is the same thing as attempted "regular" criminal fraud – by submitting incorrect information to the court.[22]

39. As I have established above, I believe that there exists credible evidence that the Stati Parties in the ECT Arbitration intentionally misled the Tribunal concerning the value of the LPG Plant. The consequence must, in my opinion, be that they also intentionally submitted incorrect information or withheld relevant information on this issue during the Swedish Annulment Proceedings. Such action and omission could qualify as "regular" criminal fraud under Swedish law.

2. Arbitration Proceedings

40. There can be no doubt that a person can commit a criminal fraud (or attempted criminal fraud) by initiating and pursuing an arbitration against another person. Nor can there be any doubt that party representatives and counsel may commit this crime as notably perpetrators or accomplices.

41. As I stated in the preceding paragraphs, I believe that there exists credible evidence that the Stati Parties in the ECT Arbitration intentionally misled the Tribunal concerning the value of the LPG Plant. This could qualify as "regular" criminal fraud under Swedish law.

I. BREACHES OF PROCEDURAL DUTIES BY THE STATI PARTIES

42. On the basis that the Stati Parties intentionally misled the Tribunal in the ECT Arbitration concerning the value of the LPG Plant, they must also in my opinion, in the Swedish Annulment Proceedings have breached their duties to tell the truth and not to litigate "against better knowledge"; they knew that they had misled the Tribunal yet stated otherwise in the Swedish Annulment Proceedings.

43. A prominent breach of those duties relates to the 15 February 2016 KPMG letter received by the Stati Parties during the Swedish Annulment Proceedings, where KPMG notifies the Stati Parties of discrepancies in statements made by the Stati Parties to the Svea Court and KPMG, respectively, and calling into question the accuracy of the

[22] NJA 1994 p. 277.

financial information submitted by the Stati Parties. In spite of this, the Stati Parties represented in the Swedish Annulment Proceedings that the Financial Statements were fair and accurate because they had been confirmed by KPMG.

44. I have identified above that the duty to tell the truth also includes "an obligation of the party to promote actively, by giving information, the investigation of the circumstances of the case to the extent that is needed with respect to the other party's rights." In my opinion, the Stati Parties did not comply with that obligation by not informing the RoK of the 15 February 2016 KPMG letter, despite knowing its relevance and importance for the RoK's case. I am also of the opinion that by opposing the assessment of the KPMG Correspondence, including the 2019 letters, in the proceedings on the RoK's Reopening Petition and the 2019 Invalidation Claim, the Stati Parties may have breached their duty to tell the truth in the same fashion.

45. I add the observation that KPMG later – after the 2016 Decision – invalidated its audits, thereby confirming that the Financial Statements were incorrect and that KPMG's audit was based on incorrect information intentionally supplied by the Stati Parties to KPMG.

J. THE CASE OF FALSE EVIDENCE

1. False Evidence in Court Proceedings

46. As stated above, the Code of Judicial Procedure is designed to promote and result in materially correct judgments based on correct facts. Judgments based on false evidence are obviously wholly incompatible with that design.

47. False evidence or testimony is one of only four narrowly defined situations where an already decided civil case may be reopened. It is an extraordinary measure. Two conditions must be satisfied to reopen a civil case where allegedly false evidence has been invoked: (i) that the evidence was false, and (ii) that the evidence may be assumed to have affected the outcome.[23] Some details of each condition are as follows.

48. The first condition is satisfied not only where, for example, a document is forged in a criminal sense but also where the maker of a document intentionally has given it a content that is incorrect, that is, does not accord with realities.[24] The first condition must also, in my opinion, be satisfied if a party in evidence invokes a document that the party has not made but knows not to accord with realities. This is not only rather obvious to me, but also supported by a recent Supreme Court decision: The respondent had testified that he was a certain individual, knowing he was not, and had in so doing

[23] Chapter 58, section 1(1) 1. of the Code of Judicial Procedure.
[24] Fitger el. al., Rättegångsbalken m.m. (JUNO, 27 maj 2020) at 58:1.

incorrectly confirmed that he was the person on the identity card that he presented to the court. The Supreme Court reopened the case where he had testified.[25]

49. The second condition expressly sets a specific standard of proof for the causal link between the false evidence and the outcome: "may be assumed". The phrase "may be assumed" is a term of art often used in legislation and case law. It is a quite low standard of proof, significantly lower than "more probable than not." In practice, this condition is intended and usually said to be satisfied already if the false evidence is mentioned in the court's reasoning in the judgment.[26]

50. It may thus in practice be a rather straightforward task for the court to decide whether a case should be reopened on account of false evidence. If the allegedly false evidence is mentioned in the court's reasons for its judgment, the remaining question is only: Was the evidence false within the meaning of the above-mentioned rules, that is, did it not accord with realities? An affirmative answer will speak strongly in favour of reopening the case.

51. Even if both conditions are satisfied, it is in the discretion of the court whether to reopen the case.

2. False Evidence in Arbitration Proceedings

i. Suggested Changes to the Law

52. The issue of false evidence and false testimony in arbitration proceedings attracted attention in the legislative process leading up to the present Arbitration Act of 1999.

53. The committee charged with making the first draft of what was to become the Arbitration Act 1999 stated that the then existing Arbitration Act of 1929:

> *"[d]oes not provide a specific ground enabling a party to challenge an arbitral award, in setting aside proceedings or otherwise, where the award is based on false evidence or has been procured by threatening the arbitrators or giving them undue remuneration. Nor are the provisions on reopening court cases available. This seems a deficiency even if the matter does not have any greater practical importance. In fact, the ideas about a fair and just decision on which the rules on reopening court cases are based, apply to some extent to disputes decided by arbitrators as well."*[27]

[25] NJA 2016 p. 18.
[26] Fitger el. al., Rättegångsbalken m.m. (JUNO, 27 maj 2020) at 58:1. NJA 2016 p. 18.
[27] SOU 1994:81 p. 182.

54. The committee suggested to remedy the deficiency by including in the forthcoming act the following provision:

> *"An arbitral award shall also be set aside at the request of a party if a document that has been invoked in evidence was false or intentionally has been given an incorrect content […] and the document may be assumed to have affected the outcome"*[28]

55. The meaning of "false evidence" in this provision, said the committee, should be the same as in the provision concerning reopening of court cases on account of false evidence.[29] The committee also deliberately set the same low standard of proof – "may be assumed" – in the suggested provision as in the just mentioned provisions on reopening court cases on account of false evidence.[30] I will come back to this below, when discussing the 2016 Decision of Svea Court in the Swedish Annulment Proceedings.

56. Thus, in short, the committee in substance suggested to subject arbitral awards based on false evidence to the same test as judgments based on false evidence.

57. The suggested new provision was in addition to the other possibilities to annul an arbitral award (now sections 33 and 34 in the Arbitration Act of 1999).

58. In the end, however, the suggested new provision did not make it into the Arbitration Act of 1999, although a majority of the bodies that responded to the committee's draft act were in favour of it or at least not opposed.[31] The decisive reason was that the provision did not, it was considered, "answer to a practical need". But it was expressly recognized that such a provision would be motivated if needed in practice.

59. The present Arbitration Act was amended in 2019. The legislative process leading up to the amendments included a suggested mechanism as a "safety valve" for dealing with "blatant" violations of public policy that could not be remedied under the provisions for annulling arbitral awards.[32] However, this mechanism was not introduced into the Act. The Svea Court – in its capacity as one of the bodies responding to the suggested amendments – advised against the mechanism. In so doing it pointed to an alternative method, a "safety valve" available under the existing law for dealing with arbitral awards involving blatant violations of public policy but not capable of being annulled. This is addressed in the next section.

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[28] Section 35.
[29] SOU 1994:81 p. 183.
[30] The committee pointed out that that standard of proof was "somewhat lower" than the standard of proof for setting aside an arbitral award for a procedural irregularity "probably" having affected the outcome.
[31] Prop. 1998/99 p. 149 (pdf version).
[32] SOU 2015:37 p. 123 et seq.

ii. A "Safety Valve" under the Existing Law

60. A Swedish arbitral award ordering performance can immediately be executed by the Swedish execution authority (just like a performative court judgment). Its execution needs no prior approval by the court. In practice, there are only two things the judgment debtor can do to prevent execution: (i) prove that the ordered performance has been done (usually that the debt has been paid) or (ii) invoke – in the words of the relevant provision – "some other circumstance concerning the parties' relation that cannot be dismissed".[33] Only very exceptional circumstances fall into the latter category, and the court – to which the execution authority's decision to execute or not execute can be appealed – rarely refuse execution on that ground.

61. The Svea Court, responding to the suggested 2019 amendments to the Arbitration Act, pointed to the possibility of refusing execution of Swedish arbitral awards blatantly violating public policy on the just mentioned ground. The Svea Court explained:

> *"Where it concerns an 'arbitral award' ordering performance, it can be determined incidentally in the execution procedure whether it is an arbitral award within the meaning of the Arbitration Act. If the execution debtor opposes execution on the ground that the document in question is not an arbitral award because, for example, the arbitrators were bribed or under a death threat, it should be possible to refuse execution under Chapter 3, section 21(2) of the Code of Execution ('some other circumstance that concerns the parties' relation'). […] In cases of this kind, the 'arbitral award' would not formally be declared null and void, but in practice. [A] forged 'arbitral award' could, in the Court's opinion, be handled in the same way*."[34]

62. The Svea Court went on to say that its proposal in practice means that also Swedish 'arbitral awards' would be subjected to the same public policy review as New York Convention awards sought to be enforced and recognized in Sweden.[35] The case of false evidence was not mentioned by the Svea Court but should in my opinion be put on par with the mentioned cases of bribery and death threat. The three cases were also – see above – put on par by the legislative committee suggesting that arbitral awards based on false evidence should be subjected to the same test as judgments based on false evidence.[36]

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[33] Chapter 3, section 21 of the Code of Execution.

[34] Response dated 5 November 2015, file no 2015/667 (*Yttrande 2015-11-05, Diarienr 2015/667*) p. 4.

[35] I was in charge of most of the drafting of the response. At that time I was not aware of the set aside case that resulted in the Svea Court's judgment of 9 December 2016. I was engaged by counsel for Kazakhstan a few days later.

[36] "[…] where the award is based on false evidence or has been procured by threatening the arbitrators or giving them undue remuneration."

63. In my opinion, also an arbitral award based on false evidence – on the condition that it qualifies for passing the test for reopening court cases on account of false evidence – could and should be refused enforcement under the mentioned provision in the Code of Execution.

K. Analysis of the Swedish Court Decisions

1. The 2016 Decision

64. When trying the RoK's allegation that the Stati Parties had invoked false evidence in the ECT Arbitration, the Svea Court did not apply the test for reopening court cases on account of false evidence. The Svea Court applied a different and much stricter test.

65. In the first place the Svea Court's reasoning is based on the premise that evidence can be false "*per se*". In the second place the Svea Court draws a distinction between direct and indirect influence of false evidence on the outcome of the arbitration. None of this has – as far as I am aware and have been able to determine – any support in Swedish law. I will now deal with this in more detail.

66. As just stated, I am not aware of any support for the view that evidence can be false or not false "*per se*" under Swedish law. That makes it difficult for me to comment the Svea Court's finding – that "the indicative bid was not *per se* to be regarded as false evidence" even if based on possibly incorrect figures because it was produced before the arbitration. The finding does not relate to anything. Nevertheless, I find it impossible to accept that the time of the production of the allegedly false evidence (before or during the arbitration) would be relevant for the issue of the falsity of the evidence.

67. If the Award had been a Swedish court judgment and the question was whether the case should be reopened on account of false evidence, it would – as I have explained above – be irrelevant whether the allegedly false evidence was or was not produced before the case began. The relevant thing under the rules allowing cases to be reopened on account of false evidence would be whether the party who had invoked the allegedly false evidence knew that it was the result of information not according with realities. An affirmative answer to that question would in my opinion mean that the evidence was false within the meaning of those rules.

68. Thus, under those rules the Indicative Bid (or more precisely the document containing the Indicative Bid) would no doubt be false evidence because the Stati Parties (or their representatives) knew that the bid was based on incorrect figures.

69. I then turn to the Svea Court's distinction between direct and indirect influence of false evidence on the outcome. As already stated, I am not aware of, nor have I been able to find any support in Swedish law for such a distinction in relation to false evidence. No such distinction is drawn under the rules allowing cases to be reopened on account of

false evidence. As I have explained above, those rules speak only of the effect of the false evidence on the outcome, the requirement being only that that effect "may be assumed", a low standard of proof, for the case to be reopened.

70. In my opinion the Svea Court could – and should – have tried this part of the case according to the rules allowing court cases to be reopened on account of false evidence. There would have been good support for doing so, not least the suggested provision for such situations that did not make it into the Arbitration Act of 1999 mainly because it was considered not to be needed. The Svea Court could then have relied on an established body of law for determining whether the indicative bid was false in the relevant sense and, if so, whether it might be assumed to have affected the outcome in the arbitration.

71. In fact, I can find no reason for not subjecting arbitral awards to the same test as court judgments when it comes to alleged false evidence. This is because the same head of public policy is involved: judicial determinations – whether court judgments or arbitral awards – should not be products of false evidence.

72. Why did the Svea Court not do so? I can think of only three real reasons. The first is a passage in Professor Heuman's commentary referred to by the Svea Court in the 2016 Decision, that an arbitral award might be contrary to public policy "in the extremely rare case where it is completely clear a party has forged a document that was decisive for the outcome". The passage has probably inspired not only the Svea Court's distinction between direct and indirect influence of false evidence on the outcome, but also the standard of proof required by the Court. The second reason is simply the firmly entrenched hesitation against setting aside arbitral awards. The third reason is that the Stati Parties breached their procedural duties to tell the truth and not litigate "against better knowledge", in so doing withholding evidence of them misleading the Tribunal, with the consequence that the basis for the Svea Court's decision was incorrect and incomplete.

2. The Supreme Court's decision of 24 October 2017

73. The extraordinary petition to the Swedish Supreme Court was based on pure procedural grounds, namely on the question whether the Svea Court of Appeal committed a grave procedural error when issuing the 2016 Decision.

74. The Swedish Supreme Court's decision was that *"[t]he Republic of Kazakhstan has not shown any circumstance constituting a miscarriage of justice."*[37]

75. This decision does not and cannot disprove the existence of the Stati Parties' fraud.

[37] Decision of the Swedish Supreme Court to refuse Kazakhstan's application for grave procedural error dated 24 October 2017, p. 2.

3. The Svea Court's dismissal on 3 February 2020 of the RoK's Evidence of Fraud in the Swedish Attachment Proceedings

76. On 3 February 2020, in the frames of the attachment proceedings before the Svea Court, the court did not allow the RoK to invoke the new evidence. The Svea Court had, therefore, not assessed the merits of the RoK's evidence.

77. In passing, it may be added that, on 17 June 2020, the Svea Court rendered its final decision in the RoK's (and its Central Bank's) favour by lifting the attachment on the assets on the basis of sovereign immunity.

4. The Svea Court's dismissal on 9 March 2020 of the 2019 Invalidation Claim

78. The Svea Court dismissed the 2019 Invalidation Claim of the RoK on 9 March 2020 on the basis that matter was *res judicata*. In the beginning of the judgment, the Svea Court of Appeal had posed a question whether *"the application for summons must be dismissed because of procedural impediment (res judicata)"*.[38] In its analysis, the Svea Court indeed found *"that procedural impediment is at hand."*[39]

79. Therefore, it is obvious that this dismissal is of pure procedural character and the merits of the RoK's application had not been assessed. For this reason, it can be concluded that, this judgment of the Svea Court of Appeal does not and cannot disprove the existence of the Stati Parties' illicit conduct.

5. The Supreme Court's decision of 18 May 2020 on RoK's Reopening Petition

80. The Swedish Supreme Court refused the RoK's Reopening Petition on 18 May 2020 with a two-line decision stating that *"[t]he Republic of Kazakhstan has not shown any circumstance that could give rise to the reopening of the case"*.[40] No reasons for the decision not to reopen the Swedish Annulment Proceedings were given. This is no surprise to me. It accords with the usual routine, and the Court is not required to give reasons for such decisions.

81. In my opinion, the decision of the Swedish Supreme Court of 18 May 2020 on the RoK's Reopening Petition does not and cannot disprove the existence of the Stati Parties' illicit conduct.

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[38] Decision of the Svea Court of Appeal dismissing Kazakhstan' second invalidation claim on the basis of res judicata dated 9 March 2020, p. 2.
[39] Decision of the Svea Court of Appeal dismissing Kazakhstan' second invalidation claim on the basis of res judicata dated 9 March 2020, p. 4.
[40] Decision of the Swedish Supreme Court refusing to re-open the Swedish set-aside proceedings dated 18 May 2020, p. 2.

L. CONCLUSIONS

82. My overall conclusion is that there is credible evidence that the Stati Parties procured the Award by actions and omissions that under Swedish law amount to criminal fraud. That conclusion is based on the views stated and the facts presented in the material that had been provided to me. This material satisfies me that the Tribunal relied on the Indicative Bid that the Stati Parties had obtained with the help of, in Professor Bermann's words, *"fraudulent financial reporting and fraudulently obtained audit reports."*[41]

83. In my opinion, this would fulfil the requirements for criminal fraud under Swedish law, essentially deceit by the Stati Parties from which they have gained at the expense of the RoK.

84. Based on the same material, I also conclude that the Stati Parties in the Swedish Annulment Proceedings violated the duty to tell the truth and the duty not to litigate "against better knowledge". I draw that conclusion because the Stati Parties knew that the Indicative Bid in effect was a fraud, yet they chose to allege in the Swedish Annulment Proceedings that they had not presented false evidence or supplied misleading evidence or withheld relevant information during the ECT Arbitration.

85. As I explained above, this is also because the Stati Parties misled the Svea Court that "KPMG had full access to all accounting records"[42] and that the Stati Parties "did not mislead KPMG [….]".[43] The Stati Parties had clearly known that this was not the case, as in its letter of 15 February 2016 to the Stati Parties KPMG raised its concerns on the facts that it had not been provided with full and truthful account.

86. Moreover, by not disclosing the 15 February 2016 KPMG letter to the Swedish courts or to RoK, the Stati Parties breached its obligation to actively promote the investigation of the circumstances of the case by the court, as an integral part of the duty to tell the truth.

87. The result was that, notably, the Svea Court did not have a correct and truthful basis for its 2016 Decision.

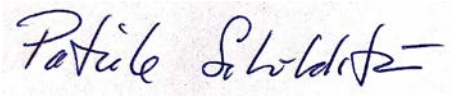
88. The Award therefore, in my opinion, violates Swedish public policy, and so would its enforcement in Sweden. I have formed this opinion in spite of the Award not having been set aside in the first Swedish Annulment Proceedings, and in spite of the Supreme Court's dismissal of the RoK's Reopening Petition.

89. In the end, it comes down to a conflict between two heads of public policy: (i) that judicial determinations should in principle be final and (ii) that judicial determinations should not be based on false evidence. In my opinion the latter should in this case take

[41] The Bermann Opinion, para. 46.
[42] The Stati Parties' Comments on the Court's Recitals dated 18 May 2016.
[43] The Stati Parties' Final Statement of Evidence dated 30 August 2016.

precedence over the former such that the Award should be refused enforcement in Sweden. I recognize that the situation where the Award is not annulled but refused enforcement in the country of origin is unconventional, but it seems to me as the only just and legal solution.

Stockholm, 23 August 2020



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