[Translator's Note: *Hand-written text in italics on this page and header*]

[Logo: Design of Brussels Court]

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Interim judgment[2]

Next hearings 5, 12 and 19/10/2021

Enforcement order

Court of Appeal Brussels

Judgment

17th chamber
civil matters

Presented on
Not registered

792 + [illegible] [COVER 01-00001820541-0001-0019-01-01-1]

[QR CODE BARCODE]

In the case of:

REPUBLIC OF KAZAKHSTAN, represented by its minister of justice, whose ministry address is 010000 ASTANA – KAZAKHSTAN, Left Bank, Mangilik El Street 8, House of Ministries 13,

Appellant

Represented by Maîtres Arnaud NUYTS and Bruno HARDY, lawyers at 1000 BRUSSELS, boulevard de l'Empereur 3,

Litigants' counsel: Maîtres Arnaud NUYTS and Michael HOUBBEN

Against:

1. **Anatolie STATI**, residing at CHISINAU, MD-2008 – MOLDOVA, Dragomina Street, 20
2. **Gabriel STATI**, residing at CHISINAU, MD-2008 – MOLDOVA, Ghioceilor Street, 1 A,
3. **ASCOM GROUP S.A**., foreign registered company, with registered address in CHISINAU, MD-2009 – MOLDOVA, Mateevici Street, 75 A,
4. **TERRA RAF TRANS TRAIDING LTD**, foreign registered company, with registered address in GIBRALTAR, Line Wall Road, 13/1

Respondents

Represented by Maîtres Sophie JACMAIN, François van DROOGHENBROECK and Stan BRIJS, lawyers at 1000 BRUSSELS, chaussée de La Hulpe, 120,

Litigants' counsel: Maîtres François van DROOGHENBROECK and Léonard MAISTRIAUX.

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The court sits to hear an application to appeal filed on 17 February 2020 against a judgment rendered by the French-speaking Court of First Instance of Brussels, Enforcement Chamber, dated 20 December 2019. No notice of this judgment has been filed.

The dispute mainly concerns a third-party application against an enforcement order pronounced on 11 December 2017 by the French-speaking Court of First Instance of Brussels granting the enforcement order for two arbitral awards rendered (respectively) on 19 December 2013 and 17 January 2014, the latter being a corrective award.

The first judge declared the application of the Republic of Kazakhstan, hereinafter referred to as 'Kazakhstan' admissible but unfounded and ordered Kazakhstan to pay the expenses of the current respondents, defendants before the first judge, hereinafter the ‘Stati parties’ in the sum of 36,000 euros (PO).[3]

Kazakhstan requests before the court:

‘To declare the appeal filed by the Republic of Kazakhstan to be admissible and founded,

On the basis that,

Introductory,

- To declare that the enforcement of the award is subject to the provisions of Part 6 of the Belgian Judicial Code as in force before the adoption of the law of 24 June 2013, and that the new provisions of the Judicial Code introduced by this law, on the basis of which the Stati parties have requested and obtained the enforcement order by a unilateral application, are not applicable;

- Pursuant to the foregoing, to declare that the appeal lodged by the Republic of Kazakhstan against the judgment of 20 December 2019 is admissible;

Main argument,

- To rule that the disputed enforcement order was made by a court that was not competent, in applying provisions that were not applicable and, consequently, to order its annulment and retraction;

– To order the Stati parties to pay all costs and expenses of the proceedings;

Argument in the alternative,

– To reserve judgment on the remaining applications pending the preparation of the case with regard to other grounds of appeal formulated by the Republic of Kazakhstan in its appeal petition and by means of cross-appeal formulated by the Stati parties;

– To reserve judgment on costs; (…)"

The Stati parties request:

(i) In the main argument, to declare the main appeal of Kazakhstan to be inadmissible in application of new article 1680 (5) of the Judicial Code, introduced by the law of 24 June 2013, amending Part 6 of the Judicial Code regarding arbitration, and to order Kazakhstan to pay the costs of the appeal.
(ii) In the alternative, and by substitution of the grounds of the Judgment under appeal, to dismiss the first grievance articulated in support of the notice of appeal filed on 17 February 2020 by Kazakhstan on the basis that the ground of lack of competence reiterated by this grievance was, and remains, inadmissible.
(iii) In the second alternative, and by substitution of the grounds of the Judgment under appeal, to dismiss the first grievance articulated in support of the notice of appeal filed on 17 February 2020 by Kazakhstan on the basis that the ground of lack of competence reiterated by this grievance was, and remains, unfounded.
(iv) In the cases referred to under (ii) and (iii):
  – To declare the Stati parties' cross-appeal admissible,
  – To reserve judgment on the appeal costs
  – On the basis of article 747 (2), paragraph 2 of the Judicial Code, to decide on the schedule to follow for the investigation of the other main and cross-appeal grievances (…)"

1. On the admissibility of Kazakhstan's appeal

The Stati parties argue that the appeal is inadmissible as the appealed judgment was binding on the parties with no right of appeal.

Kazakhstan contests this argument. For their part, the appeal is admissible in accordance with the principles of common law enshrined in articles 1050 et seq. and 1131 J.C.
According to Kazakhstan, the new Part 6 of the Judicial Code introduced by the law of 24 June 2013 is not applicable here, the disputed arbitration between Kazakhstan and the Stati parties having started in July 2010 and ended on 17 January 2014.

With regard to the applicable law, the first judge decided that "*both the clarity of the texts and the ratio legis of the transitional regime of exception make it possible to designate the Judicial Code as amended by the law of 24 June 2013 as the version applicable in this case*" (judgment a quo, p. 13).

The Stati parties invoke that "*article 1676 of the new Part 6 of the Judicial Code contains a clear distinction between arbitrations whose seat is located in Belgium and those whose seat is located abroad*". However, article 59 of the law of 24 June 2013, which contains the transitional regime, refers to article 34 of that law when it states that the law will be applicable, "*to arbitrations that commence in accordance with section 34 after the effective date of this law*". *This article 34 - which adds the new article 1702 of the Judicial Code - must be read in conjunction with items 7 and 8 of article 1676 of the same Code because the latter provisions - which establish a differentiation of regimes between domestic and foreign arbitrations - expressly prohibit the application of article 1702 to foreign arbitrations. It follows that by way of a logical and perfectly justified reasoning in the light of what is at stake, the legislator has reserved the application of the special transitional regime of the law of 24 June 2013 to only Belgian arbitrations, leaving the common law of immediate application (Art. 3, J.C.) to govern the application of said law to foreign arbitrations".*

According to the Stati parties, the very clear text of article 59 of the law of 24 June 2013 amending part 6 of the Judicial Code regarding arbitration should be applied "*within the strict limits imposed by the legislator*" (Stati parties' submissions, p.14, no. 36).

Article 3 of the Judicial Code sets forth the principle of the immediate entry into force of a new procedural law. It constitutes the confirmation of a general legal principal according to which procedural laws are immediately applicable.

Unless otherwise provided, a new procedural law will thus be applicable immediately to proceedings in course.

The law of 24 June 2013 amending Part 6 of the Judicial Code relating to arbitration has, as its name indicates, profoundly modified the provisions of the Judicial Code in the area of arbitration.

This law is a procedural law that entered into force on 1 September 2013 and should, in principle, be immediately applied to proceedings in course in accordance with article 3 of the Judicial Code.

However, the legislator inserted a transitional provision into article 59 of the law of 24 June 2013 in order to dampen the principle of immediate application. This provision is worded as follows:

"*This law applies to arbitrations which begin in accordance with article 34 after the date of entry into force of this law.*

Part 6 of the Judicial Code, as it was drafted before the entry into force of this law, remains applicable to arbitrations which began before the date of entry into force of this law.

This law applies to actions brought before the judge, insofar as they concern an arbitration referred to in the first paragraph.

Part 6 of the Judicial Code, as it was drafted before the entry into force of this law, remains applicable to actions which were pending or were introduced before the judge with regard to an arbitration referred to in the second paragraph".

Article 59 of the law of 24 June 2013 stipulates, in its first paragraph, that "*the present law applies to arbitrations that began in accordance with article 34 after the date of entry into force of this law*"

Article 34 of the law of 24 June 2013 adds into the Judicial Code the new article 1702 that stipulates that "unless agreed otherwise by the parties, the arbitration proceedings begin on the date on which the arbitration request has been communicated in accordance with article 1678 (1), a)".

The law of 24 June 2013 entered into force on 1 September 2013. In accordance with its article 59 (1), it therefore applies to arbitrations that began after this date, in addition to

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legal proceedings to annul or to enforce arbitral awards rendered in arbitration that began after this date.

Conversely, by virtue of article 59, paragraphs 2 and 4, of the law, the old provisions of Part 6 of the Judicial Code continue to apply to all arbitrations – national or foreign - commenced before 1 September 2013, as well as to all legal proceedings for the annulment or enforcement of arbitral awards - national or foreign - relating to arbitrations commenced before 1 September 2013, whether or not such legal proceedings are "pending" as of 1 September 2013.

This interpretation is the only one possible on the basis of the clear text of the law. It is confirmed by doctrine (O. Caprasse, "Introduction au nouveau droit belge de l'arbitrage" [Introduction to the new Belgian law of arbitration], in *Actualités en droit judiciaire*, Brussels, Larcier, 2013, P. 426; M. Dal, "La nouvelle loi sur l'arbitrage" [The new law on arbitration], *J.T.*, 2013, p. 794; D. Matray and G. Matray, "L'exécution sur le territoire belge des sentences arbitrales étrangères annulées dans leur pays d'origine" [The enforcement of foreign arbitration awards annulled in their country of origin in Belgium], in *Liber amicorum François Glansdorff et Pierre Legros*, Brussels, Bruylant, 2013, pp. 651-653; W. Philippe, "Modernisation of the Belgian law on arbitration", *D.A.O.R*, 2014, p.20, no. 33.)

In this case, the arbitration procedure was introduced well before 1 September 2013, when the law of 24 June 2013 entered into force.

Therefore, the provisions of Part 6 of the Judicial Code, before being amended by the law of 24 June 2013, apply in this case.

It follows that the judgment rendered is open to appeal.

As to the Stati parties' argument that the transitional provision would only apply to arbitral awards rendered in arbitration proceedings whose seat is located in Belgium: the court does not follow this reasoning, which is contrary to the terms of article 59 of the law of 24 June 2013.

In effect, the text of article 59 of the law of 24 June 2013 does not introduce any distinction between enforcement order proceedings for Belgian and foreign awards. If the legislator had wanted to limit the scope of application of the transitional regulation to Belgian awards or those rendered in Belgium, it would have inevitably been stipulated in the law.

Moreover, the new Belgian arbitration law is broadly inspired by the type of international commercial arbitration law of UNCITRAL (CNUDCI) of 21 June 1985 (*Doc. Pari*, Ch. Repr., 53-2743/001, 11 April 2013, a Law amending part 6 of the Judicial Code relating to

arbitration, p.5.) According to this law type, in the new law, the Belgian legislator specifically did not want to make a distinction between national and international arbitration.

Article 59 of the law of 24 June 2013 refers to article 34 of the same law for the sole purpose of determining the moment of commencement of the arbitration proceedings with regard to the date of entry into force of said law, 1 September 2013.

Article 34 of the law of 24 June 2013 (introducing new article 1702 in the Judicial Code) provides that the arbitral proceedings shall commence on the "*date on which the request for arbitration is received by the defendant*". This definition makes no reference to the country in which the arbitration procedure was commenced (in Belgium or abroad).

The law therefore exhaustively defines its transitional regime without having to refer to the articles incorporated by this law in the new Judicial Code. Where the legislator provides for a special transitional legal regime, that regime is by definition not set out in the articles of the Judicial Code. It follows that the Stati parties' references to the cascading application of the provisions of the new Judicial Code are not relevant to the interpretation of the provisions of the transitional regime contained in the law of 24 June 2013.

The interpretation argued for by the Stati parties is radically contrary to the legislator's intention, who had wanted to privilege legal certainty by clearly providing for the regime of entry into force of the new law in the body of its provisions (i.e. articles 59 and 34).

The provisions of the Judicial Code concerning the competence of the Belgian judge as "juge d'appui", to whom the parties can appeal during arbitration proceedings, in particular to order provisional and protective measures, can be perfectly applicable in the context of an arbitration whose seat is abroad. The Belgian judge is indeed permitted to order provisional and protective measures in support of an arbitration whose seat is not in Belgium. This is expressly confirmed by article 1676 (8) of the new Judicial Code, which makes the new articles 1696 to 1698 of the Judicial Code applicable *"regardless of the place of arbitration and notwithstanding any contractual clause to the contrary"*.

Moreover, both at the moment of initiating the arbitration proceedings as during the procedure itself, the procedural choices of the parties are guided by the practical possibilities of having the award enforced abroad (for example, the choice of competent arbitral institution to hear the

the dispute pursuant to article 26 of the ECT, which may influence the place of the seat of arbitration). However, these practical enforcement possibilities depend mainly on the legislative arsenal in force in the States in which the future debtor has assets on which to take enforcement measures. Consequently, the requirement of legal certainty pursued by the Belgian legislator would not be satisfied if a legal regime other than the one that motivated certain procedural choices of the parties during the arbitration procedure were to apply at the time of the enforcement of the award on Belgian territory.

Finally, in accordance with the new article 1676 (7) of the Judicial Code, it is also accepted that the parties may, by agreement, decide to make the rules governing arbitral proceedings contained in Part 6 of the Belgian Judicial Code applicable to their arbitral proceedings abroad.

The remedial law of 25 December 2016 also codified this possibility: "*in this regard, article 1676 (7) of the Judicial Code was reformulated (...) in order to expressly indicate that parties of an arbitration whose seat is located outside of Belgium may agree to declare Part 6 of the Judicial Code applicable and that Belgian judges may be competent 'when the parties are agreed'*."

Therefore, the legislator's choice to make the same provisions applicable to judicial proceedings concerning awards as those applicable *ratione temporis* at the time of the arbitral proceedings, and the concern for legal certainty that justifies this choice, are relevant for foreign awards as well.

One could also refer to the remedial law of 25 December 2016, which provides for several terminological and ad-hoc changes to the law of 24 June 2013. It should be noted that, among the adaptations made by the law of 25 December 2016, none of them concern the application *ratione temporis* of the law of 24 June 2013.

Contrary to the Stati parties' claims, neither the preparatory measures for the law of 24 June 2013, nor the clear terms of the transitional regime's provisions, nor the intention of the legislator nor international law justify any other decision.

The court also refers in this respect to the written conclusions of First Advocate General Henkes of 7 September 2017 (exhibit 16 of the Kazakhstan case file) which support the court's decision and which the court considers to be reproduced here.

The refutation of the reasoned opinion of First Advocate General Henkes does not convince.

The Stati parties are wrong to argue with the first judge that the transitional regime of the law of 24 June 2013 and the law of 25 December 2016, which does not require a specific transitional provision, the latter having the purpose of adding corrections, clarifications or small adaptations to the provisions of the law of 24 June 2013 (see in this respect the preparatory work cited by the appellant on page 27, note 21 of their submissions filed on 20 August 2020: "*this law concerns amendments made to the new Part 6, introduced in 2013. Thus, there is no need to provide for a specific transitional provision.*
The old Part 6 applicable to the arbitration proceedings in progress, and the related procedures before the state courts, continues to apply.
Concerning the application of the new Part 6 to the arbitration proceedings in progress, and the related procedures before the state courts, the prescription contained in article 3 of the Judicial Code is applicable.") that the provisions of the transitional regime of the law of 24 June 2013 need to be interpreted while the regime for said law to enter into force as provided in articles 59 and 34, are clear and precise and particularly in that they do not introduce any distinction between the Belgian and international arbitrations (sic).

In view of the foregoing it is not pertinent to examine the practical consequences of the criteria for placing the seat of arbitration for the application *ratione temporis* of the law of 24 June 2013.

As for the "Dutch parallel", the Stati parties rightly state that this case-law (Stati parties' exhibits 4-6) does not involve this court.

As for the position of Kazakhstan in other proceedings (for example, in the Netherlands): it is not pertinent.

The application and interpretation of a transitional legal provision of Belgian law cannot depend on the way in which a foreign jurisdiction applied a foreign procedural law.

For all intents and purposes, the Republic of Kazakhstan states that an appeal will be lodged before the Netherlands Court of Cassation, within a period that expires on 14 September 2020,

against the judgments of the Amsterdam Court of Appeal of 6 November 2018 and 14 July 2020.

Finally, as regards the timing of the application of article 1680 (5) J.C.: it does not change the fact that the new law of 24 June 2013 is not applicable in this case since the replacement of the old article by article 93(2) of the law of 25 December 2016 is only applicable insofar as the litigation is governed by the new law of 2013. Arbitration procedures to which the provisions in force prior to the amendment of the old law are applicable are not affected by the amendments made by the law of 25 December 2016, which are only minor amendments that merely supplement the provisions of the law of 24 June 2013.

See in this respect; Verbist, H., Adaptation de la loi belge d'arbitrage par la loi du 25 décembre 2016 (Adaptation of the Belgian law of arbitration by the law of 25 December 2016), b-arbitra 2/2016, 53- 265, exhibit 4 of the case file "Doctrinal and case-law sources cited by the Republic of Kazakhstan".

To the extent that the procedure in question is subject, as has been shown above, to the provisions of Part 6 of the Judicial Code in force before the adoption of the law of 24 June 2013, it is neither impacted by the provisions of the law of 25 December 2016.

The new article 1680 (5) of the Judicial Code, as amended by the Code cannot be applied in this case.

The appeal is admissible.

2. On the competence of the court that issued the enforcement order

In its second ground, Kazakhstan develops the argument of the incompetence of the court that issued the enforcement order, the order having been pronounced by the judge "*designated by the President within the framework of articles 1680 (6), 1719 to 1721 of the Judicial Code"* and not by this same judge acting as President of the Court.

The appellant infers that the enforcement order was issued by an incompetent court on the basis of non-applicable provisions.

As regards the applicable provisions, the Court refers to point 1 of this judgment in which

it was decided that the current dispute is governed by the arbitration regime contained in Part 6 of the Judicial Code as was in force before the adoption of the law of 24 June 2013.

Article 1719 (old) J.C. grants to the President of the Court of First Instance the power to decide on applications for enforcement orders of arbitral awards.

Kazakhstan requests to order the annulment and retraction of the enforcement order of 11 December 2017.

Under the terms of its summons to appear as a third party on 2 February 2018, Kazakhstan first raised an objection to the jurisdiction of the court.

"Firstly, the Court of First Instance was not competent to issue the Order. Since the arbitration proceedings started in 2010, i.e. before the entry into force on 1 September 2013 of the law of 24 June 2013 amending Part 6 of the Judicial Code on Arbitration, the provisions of Part 6 of the Judicial Code applicable to the application for enforcement of the Award are those in force before their amendment by the law of 24 June 2013. On the basis of the old article 1719 (1) of the Judicial Code, the application for enforcement had to be brought before the President of the Court of First Instance, and not before the Court of First Instance. The Stati parties erroneously referred the matter to the Court of First Instance, which issued the Order on the basis of articles 1680 (6) and 1719 to 1721 (new) of the Judicial Code, although these provisions are not applicable in the present case. As it concerns a violation of a public policy jurisdiction, your Court must necessarily annul and retract the Order on this ground alone;

(...)

B. first ground, the enforcement order was issued by an incompetent court

1. The timing of the application of the new provisions of Part 6 of the Judicial Code on arbitration

110. Legal proceedings relating to foreign arbitral awards are governed, under Belgian law, by Part 6 of the Judicial Code on Arbitration. The provisions of Part 6 of the Judicial Code have been amended by the law of 24 June 2013 and, to a much lesser extent, by the law of 25 December 2016.

111. The law of 24 June 2013 contains a transitional provision, which specifies that:

"*This law applies to arbitrations which begin in accordance with article 34 after the date of entry into force of this law.*

Part 6 of the Judicial Code, as it was drafted before the entry into force of this law, remains applicable to arbitrations which began before the date of entry into force of this law.

This law applies to actions brought before the judge, insofar as they concern an arbitration referred to in the first paragraph.

Part 6 of the Judicial Code, as it was drafted before the entry into force of this law, remains applicable to actions pending or introduced before the judge with regard to an arbitration referred to in the second paragraph".

112. The law of 24 June 2013 came into force on 1 September 2013. It therefore applies to arbitrations which commenced as from that date, as well as to legal proceedings for the annulment or enforcement of arbitral awards issued in arbitrations which commenced after that date.

113. Conversely, pursuant to article 59, paragraphs 2 and 4, of the law, the old provisions of Part 6 of the Judicial Code shall continue to apply to arbitrations initiated before 1 September 2013, as well as to all legal proceedings for the annulment or enforcement of arbitral awards which relate to arbitrations initiated before 1 September 2013, whether or not such legal proceedings are "pending" on 1 September 2013.

114. In this case, as indicated above (18), the arbitral proceedings were introduced by the Stati parties – hastily – in July 2010, thus well before the law of 24 June 2013 entered into force.

115. *It follows that the provisions which were applicable to the application for enforcement of the Award are the old provisions of Part 6 of the Judicial Code, in force before their amendment by the Law of 24 June 2013.*

2. The Order was issued by an incompetent Court

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116. Pursuant to article 1719 (1 and 2), old, of the Judicial Code, the application for enforcement of a foreign arbitral award must be introduced by a petition before the President of the Court of First Instance of the place where the award must be executed. It therefore concerns exclusive public policy jurisdiction.

117. This rule of competence has been amended by the law of 24 June 2013. The new articles 1680, (5 and 6), as well as article 1720 (1 and 2), now provide that the application for enforcement must be submitted to the Court of First Instance (of the place where the award must be enforced), and not before the President of the Court.

118. In the present case, the Stati parties erroneously based their unilateral petition on "article 1720 (2)" (new) of the Judicial Code (see item 8 in fine of their unilateral request), and they erroneously introduced it before "Mr President and Lord and Lady Justices of the French-speaking Court of First Instance of Brussels".

119. This error was not corrected during the proceedings before the court a quo. Thus, the Order was issued by the Court of First Instance on the basis of "articles 1680 (6), 1719 to 1721 of the Judicial Code". These provisions are contained in the Judicial Code as amended by the law of 24 June 2013. They do not have an equivalent in the old provisions (for example, there is no article 1680 (6) in the version of the Judicial Code applicable to the case). Moreover, the Order is expressly issued by Mr Minot "designated by the President within the framework of articles 1680 (6), 1719 to 1721 of the Judicial Code", thus in his position as judge of the Court of First Instance and not as President.

120. It follows that the Ordinance was evidently issued by an incompetent court. The violation of this rule of exclusive public policy jurisdiction must lead to the annulment of the Order.

121. Even if no grievance has to be shown, it should be stated that the error of competence committed by the Stati had negative consequences for the Republic of Kazakhstan.

122. Firstly, under the new provisions of the Judicial Code, the possibility for the party against whom execution is requested to be heard by the judge hearing the unilateral petition for enforcement has been abolished. However, this possibility was expressly provided by articles 1719 (5) of the Judicial Code, applicable to the case. The Republic of Kazakhstan was therefore perfectly entitled to be heard before the executory clause was affixed on the Award, as it had

requested in its letter of 15 November 2017.

123. As the case had been erroneously brought before the Court on the basis of the new provisions of the Judicial Code (inapplicable), the Claimant is not permitted to be heard before the enforcement order is granted.

124. Secondly, the law of 24 June 2013 also abolished the right of each party to these third-party proceedings to lodge an appeal at the Court of Appeal against the judgment of the Court of First Instance (article 1680 (5), new, of the Judicial Code), although this recourse is open to parties under the old provisions.

125. It is therefore essential that the Court should rule that the enforcement of the Award is subject to the old provisions of the Judicial Code and that the new provisions of the Judicial Code on which the court a quo erroneously based itself are not applicable.

126. Once this has been determined, the Court can only find that the judge a quo which issued the Order in question lacks competence and must, therefore, annul the Order on that ground alone.

The first judge rejected this ground after having considered that the Judicial Code as amended by the law of 24 June 2013 is the version applicable on arbitration questions, pursuant to which the Order was granted by the French-speaking Court of First Instance of Brussels acting in adherence to new articles 1680 (6) and 1719 to 1792 of the Judicial Code.

A distribution incident?

Article 88 (2) of the Judicial Code provides: 'Incidents which are raised in connection with the distribution of civil cases among divisions, chambers or judges of the same court of first instance shall be settled in the following manner:

When the incident is raised before any other ground, by one of the parties, or when it is raised by the court on the opening of pleadings, the division, chamber or judge submits the file to the President of the Court to decide if there is a need to change the assignment of the case. The registrar informs the parties of the incident, who then have eight days to file a submission. After consulting the Belgian Crown Prosecutor, the President will rule by ordinance, within eight days.

This ordinance is not subject to appeal, except by the Belgian General Prosecutor at the Court of Appeal, before the Court of Cassation, in accordance with the time period and formalities provided in article 642 (2 and 3). A copy of the Court of Cassation's ruling is sent by the Court registrar to the President of the Court of First Instance and to the parties.

The decision is binding on the judge to whom the request is submitted, any right of evaluation excepted on the merits of the case.

The distribution incidents which are settled by an ordinance of the President of the court which binds the judge, the chamber and the division to which the case is referred "*any right of evaluation excepted on the merits of the case"*. This order has therefore the same scope as a decision of the district court. Article 88 (2) J.C. reproduces the same text as that of article 660 J.C.

In the case where - as here - the competence of the judge depends on the applicable law, there is no need to apply the mechanism provided for by article 88 (2) J.C.

It is not a problem of borders between the president and one of his divisions nor a problem of assignment decided by the President of the court: the competence of the judge is based on the law and does not depend on the internal distribution of competences between the civil chambers of the court and its President.

The timing to be observed as prescribed by article 88 (2) J.C. is therefore irrelevant, as this article does not apply.

The same is true of article 186 (2) J.C. the question of incompetence raised should not be merely a "*logistical problem of distribution*".

The designation of the judge by the President "*within the framework of articles 1680 (6), 1719 to 1721 of the Judicial Code*" is based on the new provisions of Part 6 of the Judicial Code, which are not applicable. It rests on a legal basis - erroneous - explained in the decision itself.

The appellants, third parties to the enforcement decision with an obvious interest to have the dispute concerning enforcement judged in accordance with the applicable legal provisions, raised immediately - *in limine litis* - the problem of the incompetence of the judge in the first document initiating proceedings, in particular their summons to third-party proceedings by which the proceedings obtained an adversarial character (see above).

Ruling on a unilateral application and then on a third-party application, the court based its decision on competence on non-applicable legal provisions.

This decision is the logical consequence of the erroneous application of the new provisions of Part 6 of the Judicial Code, and does not constitute - as the Stati parties wrongly claim – "a simple and banal incident of distribution" (latest submissions of the Stati parties, p. 34, no. 124).

In any case and with no need to examine the other pleas and arguments of competence developed on both sides, this court, faced with an objection to the competence of the first judge

- is competent as it is the appeal judge both of the Court of First Instance, Civil Division, and of the President of the Court ruling on the matter of the enforcement order in accordance with article 1719 (old) J.C.
- takes cognisance of the dispute, exercising the powers of the judge of appeal, just as it would have done in the case where the appeal were against a decision on third party proceedings against an order of enforcement issued by the President of the Court of First Instance.

Therefore, there is no need to decide on a distribution incident with referral of the case to the competent judge, nor to proceed to the retraction of the enforcement order on the grounds of lack of competence of the judge.

Kazakhstan's ground of incompetence is rejected as being without merit.

3. On the Stati parties' cross-appeal and the other grievances of Kazakhstan

As a "*protective and subsidiary measure*", the Stati parties cross-appealed in that the first judge decided "under section 4.2 (pp. 20-22) that the Belgian judge would not be bound by the res judicata authority of the Swedish decision of the SVEA Court of 9 December 2016 and that the latter does not consequently exempt it "*from examining the award in the light of Belgian law, and more particularly of article 1721 (1) a) ii) and b) of the Judicial Code*", an appeal based on an argument that they intend to develop more extensively in the future.

Kazakhstan takes note of this cross-appeal, and reserves the right to develop later on, insofar as necessary, its arguments in response to this appeal that it contests.

The Court notes that the case is not prepared on this point, and the contesting parties intend to set out their point of view in submissions.

The same is true for Kazakhstan's other grievances.

The Court takes note and sets out a schedule for pleadings below

4. On Costs

In view of the foregoing, the court reserves judgment on expenses.

FOR THESE REASONS

THE COURT

Ruling after hearing both parties

Having regard to article 24 of the law of 15 June 1935 on the use of languages in legal cases;

Declares the main appeal admissible;

Rejecting Kazakhstan's ground of incompetence as being without merit, declares itself competent;

For the rest:

Sets the following timetable to allow the parties to take a position on the appellant's other grievances and on the cross-appeal of the Stati parties:

For the Stati parties: 26 February 2021

For Kazakhstan: 30 April 2021

For the Stati parties: 31 May 2021

For Kazakhstan: 30 June 2021

For the Stati parties: 28 July 2021

Date for last deposition of documents by the parties:

Wednesday 28 July 2021 – submission by DPA (pdf) + USB and/or physical deposition.

Pleadings:

5 October 2021 9:30 – 180 mins

12 October 2021 9:00 – 180 mins

19 October 2021 9:30 – 60 mins

Judgment reserved on expenses.

Having judged and pronounced in civil public hearing of the seventeenth chamber of the Brussels Court of Appeal, on 17 NOV. 2020

Present:

Ms Dominique DEGREEF, Counsel

Ms Patricia DELGUSTE, Registrar

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P. DELGUSTE	D. DEGREEF

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QR CODE]

Translator's notes

[1] C. Enr. : Code du droit d'enregistrement = Right of Registration Code

[2] See https://www.dictionnaire-juridique.com/definition/interlocutoire.php

[3] IP in original: injunction de payer = payment order