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No. 25 / 2021
of 2/11/2021
Number CAS-2020-00040 of the registry

Public hearing of the Court of Cassation of the Grand Duchy of Luxembourg on Thursday, February eleventh, two thousand twenty-one.

Composition of the court:

Jean-Claude WIWINIUS, Presiding Magistrate,
Eliane EICHER, Judge [*conseiller*] of the Court of Cassation,
Michel REIFFERS, Judge of the Court of Cassation,
Roger LINDEN, Judge of the Court of Cassation,
Anne-Françoise GREMLING, Judge of the Court of Appeals,
Isabelle JUNG, Attorney General,
Daniel SCHROEDER, Clerk of the Court

Between:

the REPUBLIC OF KAZAKHSTAN, represented by the president of the Republic and, as needed, by the Prime Minister or any other entity authorized to that end, acting through the Department for the Provision of Court Activity under the Supreme Court of the Republic of Kazakhstan (Administrative Office of the Supreme Court of the Republic of Kazakhstan) located at Dinmukhamed Qonayev Street 39, Nur-Sultan 010000, Kazakhstan, and otherwise by the Justice Ministry, represented by the Justice Minister, situated at 8, Magilik El Street, House of Ministries, 13 Entrance 010000, Nur-Sultan, Kazakhstan,

plaintiff in cassation,

appearing through the Luxembourg corporation [*société anonyme*] **ARENDE & MEDERNACH**, registered on List V of the Luxembourg Bar Association [*Ordre des avocats du barreau*] registry, at the offices of which it elects domicile, represented for purposes of this instance by Attorney [*Maître*] François KREMER, attorney at law,

and:

1) the Moldavian corporation ASCOM GROUP, organized and having corporate headquarters at 75, rue Mateevici, Chisinau, MD-2009, Moldavia, represented by its chairman or by any other entity authorized for that purpose, registered under number 1002600006034,

2) Anatolie STATI, residing at 20, Dragomirna Street, Chisinau, MD-2008, Moldavia,

3) Gabriel STATI, residing at 1A, Ghiocilor Street, Chisinau, MD-2008, Moldavia,

4) the Gibraltar corporation TERRA RAF TRANS TRADING LTD, organized and having corporate headquarters at 13/1 Line Wall Road, Gibraltar, British overseas territory, represented by its director or by any other entity authorized for this purpose, under registration number 68609,

defendants in cassation,

appearing through the Luxembourg limited-liability corporation [*société à responsabilité limitée*] **NAUTADUTILH AVOCATS LUXEMBOURG**, registered on List V of the Luxembourg Bar Association registry, at the offices of which it elects domicile, represented for purposes of this instance by Attorney Antoine LANIEZ, attorney at law.

In consideration of the disputed decision, Number 133/19, handed down December 19, 2019 under docket number CAL-2018-00013 of the Eighth Chamber of the Court of Appeals of the Grand Duchy of Luxembourg, deciding on civil and enforcement matters;

In consideration of the filing of cassation served on March 12, 2020 by the REPUBLIC OF KAZAKHSTAN to the Moldavian corporation ASCOM GROUP, Anatolie STATI, Gabriel STATI and the Gibraltar corporation TERRA RAF TRANS TRADING LTD., filed March 16, 2020 with the Clerk of the Court;

In consideration of the brief in response, served on May 8, 2020 by the ASCOM GROUP, Anatolie STATI, Gabriel STATI and TERRA RAF TRANS TRADING LTD. to the REPUBLIC OF KAZAKHSTAN, filed May 12, 2020 with the Clerk of the Court;

Concerning the report from Judge Roger LINDEN and the conclusions of First Attorney General Marie-Jeanne KAPPWEILER;

Concerning the facts

According to the disputed decision, by order dated August 30, 2017, the first vice president of the district court [*tribunal d'arrondissement*] of Luxembourg declared as enforceable on the Grand Duchy of Luxembourg the arbitral ruling of December 19, 2013 of the Arbitration Institute of the Stockholm Chamber of Commerce, as amended January 17, 2014, handed down between, on the one hand, the REPUBLIC OF KAZAKHSTAN and, on the other hand, the Moldavian corporation ASCOM GROUP, Anatolie STATI and Gabriel STATI and the Gibraltar corporation TERRA RAF TRANS TRADING LTD. The Court of Appeals upheld this order.

Concerning the request for the rejection of exhibits produced by the plaintiff in cassation

The defendants in cassation have concluded by rejecting the exhibits numbered 28 to 35, 39, 40, 42, 44, 45 and 48 to 50 produced by the plaintiff in cassation in support of the brief in cassation, due to their not having been produced before the Court of Appeals.

Article 25 of the amended law of February 18, 1885 on appeals and the cassation procedure provides that *“The facts alleged in briefs communicated prior to the decision ruling on the appeal, and not established by the appealed judgment or decision, may only be proven through written exhibits produced before the judge who handed down the disputed decision.”*

In the disputed decision, the Court of Appeals rejected all the exhibits produced by the plaintiff during the course of the deliberations for failing to comply with the principle that both parties are to be heard, but analyzed the relevance of Exhibits 34 and 35 produced in support of the claim for revocation of the order of closure of the examination.

It follows from this that Exhibits 28 to 35, 39, 40, 42, 44, 45 and 48 to 50 are to be excluded from the arguments.

Concerning the seventh ground of appeal, which is prior

Exposition of the ground of appeal

“deriving from the violation of Article 65 of the Luxembourg New Code of Civil Procedure [Nouveau code de procédure civile], which provides that:

‘The judge must in all circumstances provide for compliance, and himself comply, with the principle that both parties are to be heard.

He may only include in his decision the grounds, explanations and documents claimed or produced by the parties if they have been subject to discussion on an adversarial basis by both parties.

He may not base his decision on legal grounds that he has raised at his own behest without first requesting the parties to present their comments’

from Article 47 of the European Union Charter of Fundamental Rights, pursuant to which:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

from Article 6, Paragraph 1 of the European Convention on Human Rights, dedicated to the right to an equitable process pursuant to which:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

and with regard to Article 13 of the European Convention of Human Rights dedicated to the right to effective appeal pursuant to which:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

in so far as the disputed decision,

rejecting the appeal filed by the Republic of Kazakhstan and sentencing it to the payment of expenses, and by so doing confirming the declaration of execution of the Arbitral Ruling,

determined, in the case in question, that 'the allegations raised by the appellant, even assuming them to have been proven, and the fact that KPMG has withdrawn its reports concerning the financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not of such a kind as to constitute fraud tarnishing the very basis of the respondents' investment in Kazakhstan, since this investment had commenced well prior to the maneuvers criticized by the appellant; they are therefore not of such a nature as to have an influence on the competence of the Arbitral Court' (Page 35 of the disputed decision);

and that 'both the arguments of fraud already alleged previously before the SVEA Court, and certain items of new evidence claimed before this Court, as well as the new evidence currently referenced with regard to the KPMG letter, have the purpose of setting forth that KMG's indicative offer is based on false assumptions and therefore cannot be used by the arbiters to assess damages and interest for the LPG [liquefied petroleum gas] plant' (Page 40 of the disputed decision);

therefore, in acting in this manner, the Court of Appeals based its decision on facts not argued in the presence of both parties, thereby violating the adversarial principle and consequently the right to a fair process.”

Response from the Court

In consideration of Article 65 of the New Code of Civil Procedure.

By taking into consideration two exhibits not submitted for argument in the presence of both parties, for analysis as to their impact on the outcome of the litigation, the appeals court judges violated the provision referenced above.

It follows from this that the decision is subject to cassation.

Concerning the request for the allocation of procedural compensation

Since the defendants in cassation are to be sentenced to pay the expenses of the court in cassation, their claim for the allocation of procedural compensation is to be rejected.

ON THESE GROUNDS,

and without giving rise to ruling on the other grounds of appeal,

the Court of Cassation:

sets aside and annuls the decision handed down on December 19, 2019 by the Eighth Chamber of the Court of Appeals deciding on civil and enforcement matters, under No. CAL-2018-00013 of the registry;

declares said court decision and the instruments resulting therefrom as null and void, restores the parties to the condition in which they found themselves prior to the annulled decision and, for all legal purposes, refers them back to the Court of Appeals, in its new composition;

rejects the claim of the defendants in cassation for the allocation of procedural compensation;

sentences them to payment of the expenses of the court of cassation with a set-aside in favor of the corporation ARENDT & MEDERNACH, based on its claims as to law;

orders that under the responsibility of the federal attorney general, this decision is to be transcribed into the registry of the Court of Appeals of the Grand Duchy of Luxembourg and that a statement referring to the transcription of the decision is to be set forth in the margin of the record of the cancelled decision.

This decision was read in the aforementioned public hearing by Presiding Magistrate Jean-Claude WIWINIUS in the presence of Attorney General Isabelle JUNG and Clerk of the Court Daniel SCHROEDER.