PROSECUTOR'S OFFICE

AT THE

HIGH COUNCIL OF THE NETHERLANDS

Number20/02827
Session4 June 2021

CONCLUSION

P. Vias

In the case

Republic of Kazakhstan, established in Astana, Kazakhstan
(hereinafter Kazakhstan)

against

1. Anatoli Stati,
residing in Chisinau, Moldova,
2. Gabriel Stati,
residing in Chisinau, Moldova,
3. Ascom Group S.A.,
established in Chisinau, Moldova,
4. Terra Raf Trans Traiding Ltd,
established in Gilbraltar
(hereinafter jointly referred to as: Stati c.s.)

In this case Stati et al. applied for recognition and enforcement in the Netherlands of two arbitral awards made in Stockholm in December 2013 and January 2014 between Stati et al. and Kazakhstan, pursuant to Article 1075 of the Dutch Code of Civil Procedure. The court of appeal has deemed itself competent to take cognisance of this request and has granted the request. In these proceedings, Kazakhstan complains that the court of appeal had no jurisdiction, because the Dutch arbitration law, as it applied before 1 January 2015, is not applicable to this case. For that reason, on the basis of art. 1075 (old) Rv, not the court of appeal, but the court in preliminary relief proceedings would have jurisdiction to decide on the request.

1. Facts and process

1.1 In cassation the following can be assumed. [1] Stati et al. owned shares in two Kazakh companies, which were involved in the exploitation of oil fields in Kazakhstan. In 2010, after a dispute between the parties, the exploitation rights for the oil fields ended.

1.2 Stati et al. initiated arbitration proceedings against Kazakhstan before the *Arbitration Institute* (hereinafter: the Arbitral Tribunal) attached to the *Stockholm Chamber of Commerce pursuant to* Article 26(3) of the Energy Charter Treaty2 . By arbitral awards of 19 December 2013 and 17 January 2014, the Arbitration Tribunal upheld the claims of Stati et al. and ordered Kazakhstan to pay an amount of USD 497,685,101 in damages.

1.3 Kazakhstan applied to the competent court in Stockholm for the annulment of the arbitral awards. That application was rejected. Kazakhstan lodged an extraordinary appeal against this decision (seeking the annulment of the arbitral awards on grounds of 'grave procedural mistake'), which was rejected by the Swedish Supreme Court in its decision of 24 October 2017. No further appeal has been lodged against the judgment rejecting the application for setting aside.

1.4 Stati et al. applied to the Court of Appeal of Amsterdam on 26 September 2017, requesting the recognition and enforcement of the arbitral awards pursuant to Article 1075 of the Dutch Code of Civil Procedure in conjunction with Articles III and IV of the 1958 New York Convention, or in any event Article 1076 of the Dutch Code of Civil Procedure. Stati et al. also directed the request against the *National Fund of the Republic of Kazakhstan* (hereinafter referred to as: National Fund) and the company Samruk-Kazyna JSC (hereinafter referred to as: Samruk).

1.5 Kazakhstan submitted a defence and requested the court to declare itself incompetent to take cognisance of the case and to refer it to the interim relief judge of the District Court of Amsterdam, or at least to reject the request.

1.6 By interlocutory order of 6 November 20183 (hereinafter: the interlocutory order), the Court of Appeal has ruled that it has jurisdiction to take cognisance of this request. To this end, the Court of Appeal considered, in summary, the following. In support of its claim of lack of jurisdiction, Kazakhstan referred to art. IV of the Act on Modernisation of Arbitration Law, in which a

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1See paragraphs 2.1-2.4 of the final decision of the Court of Appeal of Amsterd am of 14 July 2020, ECLI:NL:GHAMS:2020:2032.
2Energy Charter Treaty and Annexes, Treaty Series 1995, 108 and Treaty Series 1995, 250.

3ECLI :NL:GHAMS:2018:4155, JBPr 2019/19, m. nt. C. L. Schleijpen.

transitional arrangement is included. Art. IV paragraph 2 of this Act implies that the provisions of the new arbitration law do not apply to arbitrations that are or were already pending at the time of entry into force of the new law (1 January 2015). However, according to the Court of Appeal, this rule is not intended for foreign arbitration proceedings, which the Court deduces from the legislative text and the Explanatory Memorandum. This shows that the purpose of the transitional law is to prevent two different kinds of arbitral procedural law from successively applying to arbitral proceedings. This risk does not arise in foreign arbitration proceedings. The old (Dutch) arbitration law did not apply to these arbitrations, so that this law cannot 'continue to apply' due to a respectful effect, and therefore the problem of two different types of (Dutch) arbitration procedural law applying to the same lawsuit does not arise either. Also article IV (2) of the Act is not written for foreign arbitrations (paragraphs 2.3-2.4).

1.7 The Court also rejected Kazakhstan's argument that there are substantial differences between the old and the new arbitration law, which the parties could not have anticipated. These changes include the fact that pursuant to art. 1076 paragraph 4 of the Code of Civil Procedure (new), enforcement may only be refused if the party relying on it has *timely argued* in the arbitration proceedings that the arbitrators have violated their mandate and if the non-compliance is *of a serious nature*. According to the Court of Appeal, this is a change of minor nature and it is also very questionable whether parties to foreign arbitration proceedings take such Dutch procedural requirements into account. The introduction of art. 1074d Rv (new) is also not considered of sufficient importance by the Court of Appeal (ground 2.6).

1.8 The Court of Appeal then assessed whether this interpretation of the transitional law leads to an unjustified distinction between Dutch and foreign arbitrations, in the sense that the recognition and enforcement of a foreign award is subject to only one authority, whereas Dutch awards can be assessed in two instances. According to the court of appeal, this distinction by law applies in any case to post-conviction arbitrations.
arbitrations commenced on 1 January 2015. A different interpretation of the transitional law would therefore not lead to a permanent solution to this problem, according to the Court of Appeal. Moreover, according to the Court of Appeal, Article III of the New York Convention (which prescribes that the recognition or enforcement of arbitral awards governed by that Convention may not be subject to 'substantially more onerous conditions' than those applicable to domestic arbitral awards) is not automatically in conflict with this. The fact that the recognition and enforcement of a foreign arbitral award is subject to only one authority cannot, according to the Court of Appeal, be regarded as a considerably more onerous condition (section 2.7).

1.9 The court rejected the applications against Samruk and National Fund, because they were not parties to the arbitration awards (paragraphs 2.12 and 2.14).

1.10 By a final order of 14 July 20204 , the court assessed Kazakhstan's appeal for refusal of recognition and enforcement. The court came to the conclusion that

[4] See also *JOR* 2020/299 with commentary. C.L. Schleijpen.

none of the alleged grounds for refusal apply. The court recognised the arbitral awards and granted leave for enforcement.

1.11 Kazakhstan lodged an appeal in cassation against the interlocutory order and the final decision on the basis of art. 1075 (old) Code of Civil Procedure, taking into account the two-month period prescribed by that provision. Stati et al. put forward a defence and claimed that Kazakhstan's application was inadmissible.

2. Discussion of the admissibility of the appeal in cassation

2.1 In their defence Stati et al. relied on Kazakhstan's inadmissibility in their appeal to the Supreme Court, because no appeal to the Supreme Court is possible against the granting of leave for enforcement and Kazakhstan did not put forward any grounds for appeal. I would like to make the following comments on Kazakhstan's plea of inadmissibility.

2.2 In its judgment of 25 June 2010 in the case of *Rosneft/Yukos Capita/5,* the Supreme Court ruled that no appeal lies against the grant of exequatur pursuant to art. 1075 (old) Code of Civil Procedure. Art. 1062 (4) (old) Rv (now art. 1062 (3) Rv) provides that no appeal is possible against the granting of leave to execute an arbitral award rendered in the Netherlands, other than cancellation and revocation (art. 1064 (1) (old) Rv, now art. 1064 Rv). This means that no appeal may be lodged against the grant of exequatur, but that an action for setting aside or revocation of the arbitral award itself will also affect the exequatur already granted. [6] An appeal may, however, be lodged against a refusal of enforcement. This is an 'asymmetrical' prohibition of legal remedies.7 As such, this prohibition of legal remedies did not apply to the granting of leave to proceed to enforcement under art. 1075 (old and new) of the Dutch Code of Civil Procedure of arbitral awards made abroad which are covered by the New York Convention8 . After all, art. 1075 (old) Rv (now art. 1075 paragraph 2 Rv) declares art. 989 Rv (appeal) and 990 Rv (cassation) applicable by analogy. In the *Rosneft/Yukos* Capita decision, the Supreme Court ruled that this distinction between arbitral awards rendered in the Netherlands and abroad is in conflict with Art. III. of the New York Convention. Article III New York Convention provides that the recognition and enforcement of arbitral awards covered by the Convention may not be subjected to conditions that are appreciably more onerous than those to which the recognition and enforcement of domestic awards is subject (hereinafter: the prohibition of discrimination). According to the Supreme Court, the exequatur procedure for foreign arbitral awards would be considerably more cumbersome if it also included the possibility of appeal and cassation.

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[5] HR 25 June 2010, ECLI:NL:HR:2010:BM1679, NJ 2012/55, m.n.. H. J. Snijders , TvA 2011/9, m.n.. J. J. van Haersolte-van Hof.

[6] Green Series on Civil Procedure, art. 1062 Rv, notes. 4 (H.J. Snijders). See also A.J. van den Berg et al., Arbitration law, 1992, p. 128-129 ; P. Sanders, Het Nederlandse Arbitragerecht, 2001, p. 174.

[7] See on this point, inter alia, J.W. Bitter and R. Schellaars, De tenuitvoerlegging , vernietiging en revoking van arbitrales verdonnissen naar huidige en naar toekomstige recht (The enforcement, annulment and revocation of arbitral awards under current and future law), TvA 2013/37; J.Ph. de Korte, Een wereld van verschil - verlof tot handhaving en erkenning van annulling een buitenlandse arbitraal uitspraak (A world of difference - leave to execute and recognise the annulment of a foreign arbitral award), TvA 2012/58; D.A.M.H.W . Strik and J.B.J. Hoefnagel, Exclusion Agreements and the Consultation Bill on Revision of Arbitration Legislation: a Missed Opportunity, TvA 2012/20.

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, Treaty Series 1958, 145.

exist.[9] Thus, the granting of leave to enforce a foreign arbitral award covered by the New York Convention is not subject to any appeal. This prohibition of legal remedies also applies to the recognition of a foreign award10 , but may (like any prohibition of legal remedies) be broken in the event that one of the grounds for breaking the prohibition as accepted by the Supreme Court11 arises or if Article 6 ECHR is violated. This may be the case if there is no possibility to nullify the arbitral award in the country where it was made. [12] In that case, the principle of *equality of arms* may be infringed*,* because the possibilities for obtaining leave to proceed with enforcement differ from the possibilities for blocking it to such an extent that one party is placed at a substantial disadvantage compared to the other.

2.3 The central question in the present case is whether the prohibition on appeal (against the granting of leave for enforcement) also extends to decisions on the court's jurisdiction to hear the application for recognition and enforcement . The decision of the Supreme Court in *Rosneft/Yukos Capital* only relates to *the granting of exequatur,* because article 1062 section 4 (old) of the Dutch Code of Civil Procedure only deals with exequatur. This raises the question of the scope of article 1062 paragraph 4 (old) Rv (now article 1062 paragraph 3 Rv). The following can be read about this provision in the parliamentary history:

> If leave is granted, the applicant's opposite party may bring only the legal remedy provided for in Article 1064, i.e. an action for setting aside. If successful, the annulment of the arbitral award shall automatically entail the annulment of the exequatur granted. The bringing of such an action shall not suspend enforcement. However, an application for suspension may be made: see Article 1066 and its explanatory notes. [13]

It may be inferred from this passage that the idea behind the prohibition of legal remedies was the following. A separate action against the granting of leave for enforcement is unnecessary and undesirable, because the grounds for refusal of enforcement are the same as those for setting aside an award under article 1065 paragraph 1 of the Code of Civil Procedure (old and new), and can therefore be raised in an enforcement action. The annulment of the arbitral award will then also affect the granting of leave to appeal. Thus, despite the prohibition on legal remedies, the other party to the enforcement proceedings has a legal remedy, namely, setting aside (or revocation). [14] This justifies the exclusion of appeal and cassation against the grant of exequatur. [15] The exclusion of appeals against the granting of leave to appeal and enforcement of arbitral awards given abroad is also justified.

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[9] HR 25 June 2010, cited above, paragraph 3.4. See also Green Series on Civil Procedure, art. 1075 Rv, note 9 (H.J. Snijders). 9 (H.J. Snijders); T&C Rv, art. 1075 Rv, note 3 (G. J. Meijer). 3 (G. J. Meijer); J. Ph. de Korte, Welke consequenties heeft het discriminatieverbod van artikel III van het Verdrag van New York voor de Nederlandse exequaturprocedure? TvA 2007/3.

[10] See HR 21 March 2017, ECLI:NL:HR:2017:555, NJ 2017/343 , m. nl. L. Strikwerda.

[11] HR 25 June 2010, cited above, paragraph 3.5. See in this respect B. T. M. van der Wiel and others, Cassation, 2019/160 (B. T. M. van de Wiel and N. T. Dempsey).

[12] HR 25 June 2010, cited above, paragraph 3.8.4. See also HR 1 May 2015, ECLI:NL:HR:2015:1194, NJ 2015/454, m.v. L. Strikwerda ((; ukurova Holding/Sonera Holding, paragraph 3.3.1 e.f.). L. Strikwerda *((; ukurova Holding/Sonera Holding),* 3.3.1 et seq.

[13] G. J. Meijer and others , Parl. Gesch. Arbitration Act 2015/111.44.3.

[14] See also the note by W.D.H. Asser to the Amsterdam Court of Appeal 27 August 1998, TvA 2000/170.

[15] See the note by J.J. van Haersolte-van Hof to the *Rosneft/Yukos Capital* judgment*,* TvA 2001/9, at 2.

judgements is therefore justified, provided that in the relevant 'foreign country' there is or has been a possibility of annulment.

2.4 In my opinion, it follows from the above that the jurisdiction of the court to grant leave for enforcement is not covered by the prohibition on appeal in art. 1062 paragraph 4 (old) Rv. After all, this is not a question that can be raised in nullification proceedings based on art. 1064 Rv (old and new). The issue there is whether the arbitral award is so defective that it must be set aside on one of the grounds referred to in art. 1065 paragraph 1 Rv (old and new). The annulment procedure is not intended as a legal remedy against the order granting leave for enforcement as such. The same applies to the claim for revocation on the grounds of art. 1068 Rv (old and new). I am therefore of the opinion that the appeal in cassation is right in stating that the prohibition on legal remedies is not applicable and that therefore no grounds for revocation needed to be stated either.

2.5 I also note that there is no risk of a violation of the prohibition on discrimination of Art. III. of New York. After all, the question at issue in cassation - how should the transitional law of Dutch arbitration law be interpreted and which court has jurisdiction - may also arise in proceedings arising from a request for exequatur of an arbitral award rendered in the Netherlands pursuant to art. 1062 Rv (old and new). Also then, the asymmetrical legal prohibition does not apply.

2.6 The above leads to the conclusion that Kazakhstan's appeal in cassation is admissible.

3. Discussion of the appeal in cassation

3.1 The appeal in cassation consists of two parts. Subsection 1 contains a complaint directed at the Court of Appeal's assessment of jurisdiction in sections 2.1 to 2.7 of the interlocutory order. Subsection 2 contains a complaint that builds on subsection 1.

3.2 Subsection 1 complains about the opinion that the Court of Appeal has jurisdiction to hear the request of Stati et al. because the transitional law of the Arbitration (Modernisation) Act lacks application since it was not written for foreign arbitration proceedings. According to the sub-section, this opinion is based on an error of law. The subsection argues that art. IV of the Modernization of Arbitration Law Act implies that the Fourth Book of the Dutch Code of Civil Procedure remains applicable to arbitration proceedings commenced before 1 January 2015, irrespective of whether these are foreign or Dutch arbitration proceedings, and that it is incorrect to make a distinction between them on the ground that foreign arbitration proceedings are not covered by Dutch law. According to the section, Articles 1074-1076 Rv (old and new) were and are applicable to foreign arbitrations.

3.3 As of 1 January 2015, the Fourth Book ('Arbitration') of the Dutch Code of Civil Procedure has been substantially amended on the basis of the Modernisation of Arbitration Law Act. [16] Art. IV of this Act regulates the transitional law and reads as follows:

> 1. This Act shall apply to arbitrations commenced on or after the date of entry into force of this Act.
> 2. Arbitrations which are or were pending before the date of entry into force of this Act shall continue to be governed by the Fourth Book of the Code of Civil Procedure, as it applied before the date of entry into force of this Act.
> 3. This Act shall apply to cases brought before a court by the issue of a writ of summons or by the submission of a petition for commencement of proceedings if and to the extent that arbitrations as referred to in paragraph 1 are involved.
> 4. This Act shall not apply to matters which have been or are to be brought before a court by the issue of a summons or by the submission of a petition for commencement of proceedings if and to the extent that it concerns arbitrations as referred to in paragraph 2. The Fourth Book of the Code of Civil Procedure, as it applied before the date of entry into force of this Act, shall continue to apply to such cases.

3.4 The Explanatory Memorandum to the bill on modernisation of arbitration law states the following about this provision:

> This article contains transitional law. The proposed rules shall apply to arbitrations which have only been commenced on or after the date of entry into force (paragraph 1). The current rules will continue to apply to cases which were already pending before the date of entry into force (paragraph 2). This not only prevents the same arbitral proceedings from successively being governed by two different types of arbitral procedural law. It also prevents a friction with the arbitration rules of arbitration institutes which are geared to the current arbitration rules, because they often continue to apply to pending arbitrations on the basis of those rules. The proposed transitional law enables arbitral tribunals to bring their arbitration rules into line with the proposed arbitral procedural law and to make them applicable to cases pending as from the date of entry into force of the proposed arbitral procedural law. (...).
> Subsections 3 and 4 build on subsections 1 and 2. Subsection 3 provides that the proposed procedural rules, if and to the extent that they relate to cases brought before the administrative courts by the issue of a writ of summons or by the submission of a writ of initiation, apply to arbitrations governed by the proposed procedural rules. For arbitrations to which the present procedural law remains applicable, the proposed procedural law does not apply if and to the extent that it relates to cases brought before the State Court by the issue of a writ of summons or by the submission of a writ of initiation. The present procedural law will continue to apply to them. The third and fourth paragraphs ensure that the arbitral tribunal and the state court do not apply a different, possibly even contradictory, procedural law'. [17]

It is clear from this explanation that the purpose of the transitional arrangement is to prevent two different systems of arbitral procedure from applying to an arbitral proceeding that has already commenced.

3.5 Art. IV Act on modernisation of arbitration law makes no distinction between arbitrations conducted in the Netherlands and arbitrations conducted outside the Netherlands. Neither the legislative text nor

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[16] Act of 2 June 2014 to amend Book 3, Book 6 and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure in connection with the modernisation of the Arbitration Act, Sib. 2014, 200.
[17] Lower House, session year 2012-2013, 33 611, no. 3, p. 45-46.

the legislative history give rise to the assumption that foreign arbitrations would not be covered by Art. IV. Art. IV par. 2 stipulates that for arbitrations that are or were pending before 1 January 2015 (the date of entry into force of the Act), the Fourth Book of the Dutch Code of Civil Procedure remains applicable, as it was before that date. This means that the transitional arrangement of Article IV also applies to foreign arbitration proceedings, for which rules have been provided in Title II of Book 4 of the Dutch Code of Civil Procedure. This means that on an application for leave to enforce an arbitral award rendered in foreign arbitration proceedings commenced before 1 January 2015, the old (then applicable) arbitration law still applies. [18] It does not make any difference that the application procedure itself was commenced after 1 January 2015, as also appears from Article IV paragraph 4 of the Arbitration (Modernisation) Act. [19]

3.6 However, the issue is not undisputed in case law and literature. This case offers the Supreme Court the opportunity to give an opinion on this issue. In the literature it is argued that a foreign arbitral award only 'enters' Dutch law at the moment when recognition and enforcement of that award is sought in the Netherlands. Until that moment, the arbitral proceedings are governed by foreign arbitration law and not by Dutch arbitration law. Therefore, it is argued, it cannot be said that Dutch arbitration law 'continues to apply' to proceedings conducted abroad, as stipulated in art. IV (2) of the Arbitration Law Modernisation Act. According to this view, the possible continuity problems outlined in the Explanatory Memorandum do not arise, and there is therefore no reason to apply the arbitration law from before 1 January 2015.[21] I am not convinced by this view, because it is contrary to the clear text of Art. IV and does not take into account the fact that Art. IV refers to the Fourth Book of the Code of Legal Procedure in its entirety, which therefore includes the provisions applicable to foreign arbitrations. If the legislator had had the intention to exclude foreign arbitrations from the transitional regime included in article IV, this would not have been the case.

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[18] See oak no. 2.1 of my conclusion (ECLI :NL:PHR:2017:35) for the already mentioned judgment HR 21 March 2017, ECLI:NL:HR:2017:555, NJ 2017/343, m. nt. L. Strikwerda *(Nelux/Nakash)*.

[19] Thus oak: Groene Serie Burgerlijke Rechtsvordering, boek 4 Rv, aant. 4.1 (H.J. Snijders): 'To assume that old law also remains applicable to] petition proceedings initiated as from 1 January 2015 concerning arbitrations that were instituted abroad before 1 January 2015, although for those arbitrations not Articles 1020-1073 Rv (Title IV.1 Rv concerning arbitration in the Netherlands), but Articles 1074-1076 Rv (Title IV.2 Rv concerning arbitration abroad) apply. The text of the law does not make a distinction in this respect, and such a distinction does not seem appropriate to oak. These foreign arbitrations were instituted before 1 January 2015 and were therefore, to the extent that Dutch arbitration law was already applicable to them (and then it concerns art. 1074-1076 Rv), governed by Dutch arbitration law in force at the time. There is no reason to differentiate on this point between Dutch and foreign arbitrations'; H.J. Snijders, Enkele overgangsrecht opmerkingen in aanleiding van de Maximov-debeschikking en diverse rechtspraak, TvA 2019/48.1. See also Wouter de Clerck, Deferred effect of the new arbitration law: plea for a simple(r) reading of the transitional law, in: R. de Graaff and D.F.H. Stein (ed.), Het Pleil beslecht, Opstellen ter gelegenheid van het 210-yr bestaan van het Genootschap Iustitia & Amicitia , 2020, p. 71-78. In a similar vein: Court of Appeal 's-Hertogenbosch 24 January 2019, ECLI:NL:GHSHE:2019:217; Rb. Noord-Nederland 28 November 2017, ECLI:NL:RBNNE:2017:4536.

[20] See G. J. Meijer, T&C Burgerlijke Rechtsvordering, Inleidende opmerkingen bij: Fourth Book Arbitration , rev. 1b; C.L. Schleijpen , JBPr 2019/19, at 5; B.R.D. Hoebeke, Arbitration Act 2015: Leroi est mort, vive le roi!, JBPr 2015/907, at 9.

[21] In this sense: Amsterdam Court of Appeal 19 December 2017, ECLI:NL:GHAMS:2017:5325; Amsterdam Court of Appeal 29 May 2018, ECLI:NL:GHAMS:2018:1841 and ECLI:NL:GHAMS:2018:1842; Court of Appeal of The Hague 10 September2019 , ECLI:N L:GHDHA:2019:2461; Court of Appeal of The Hague 25 August 2020, ECLI:N L:GHDHA:2020:2183.

this should be reflected in the legal text. This is not the case, as stated above.

3.7 In the literature it is also pointed out that the importance of continuity in the application of arbitration law, mentioned in the Explanatory Memorandum to Article IV, does not play a role in foreign arbitration proceedings. In itself it is correct that this interest is greater for Dutch arbitration proceedings than for foreign. After all, the differences between old and new arbitration law are particularly significant for Dutch arbitration procedures, regulated in the First Title of Book 4 of the Dutch Code of Civil Procedure. This Title is much more extensive than the Second Title on arbitration outside the Netherlands, but the Second Title has also been amended by the Act on modernisation of arbitration law. One of them is central to this case, namely that the Court of Appeal, instead of the Interim Injunction Judge as competent court, will hear applications based on art. 1075 and 1076 of the Dutch Code of Civil Procedure in the first and only instance. The possibility of an appeal (against a rejection of the application) has thus been removed. [22] Another substantive change concerns the ground for refusal in art. 1076 paragraph 1 under Ac (new) Rv in conjunction with art. 1076 paragraph 4 (new) Rv: enforcement of an arbitral award may only be refused if the arbitral tribunal has seriously violated its mandate. [23] In subsections 2.6 and 2.7 of its interlocutory decision, the Court of Appeal has considered that these and other amendments to the Second Part are not important for the interpretation of article IV of the Dutch Act on modernisation of arbitration law, because, among other things, they are of a subordinate nature, do not occur in these proceedings, or are not relevant in any other respect. However, none of this seems to me to be relevant to the interpretation of the transitional regulation, as it is clear enough in itself. It is sufficient to establish that the regime for foreign arbitrations has also changed as of 1 January 2015 and that it therefore makes a difference whether the old arbitration law or the new law is applied.

3.8 I conclude that part 1 succeeds. Not the Court of Appeal, but the Court in preliminary relief proceedings had jurisdiction in this case, since it has been established that the arbitral awards date from 19 December 2013 and 17 January 2014, so that with regard to the recognition and enforcement in the Netherlands, the law that applied before 1 January 2015 is applicable.

3.9 Stati et al. still argued that Kazakhstan has no respectable interest in its wish to refer the case to the judge hearing applications for interim relief, because the court of appeal has assessed the content of Kazakhstan's defences to the application for enforcement and has found them to be unfounded. [24] I am of the opinion that this argument cannot be accepted, because rules of absolute jurisdiction are of public order. [25] The fact that the court of appeal has assessed the request for enforcement on the merits is not an argument to set aside the rule of absolute jurisdiction that in this case the judge in preliminary relief proceedings is competent by virtue of the transitional law of art. IV of the Modernisation of Arbitration Law Act.

3.10 Part 2 of the plea contains a further complaint directed against the recognition and granting of leave for enforcement in the final decision (para. 3.4

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[22] See Green Series on Civil Procedure, art. 1075 Rv, note 7 (H.J. Snijders). 7 (H.J. Snijders).
[23] See Green Series on Civil Procedure, art. 1076 Rv, note 5 (H.J. Snijders). 5 (H.J. Snijders).
[24] See Defence also claiming inadmissibility, under 27, p. **11.**
[25] See Asser Procesrecht/Korthals Altes & Groen 7 2015/205.

3.35, 3.41 and the operative part). In view of the success of part 1, this second part also succeeds.

4. Conclusion

The conclusion is to set aside the contested decisions of the Court of Appeal of Amsterdam and to refer the case back to the Court of Amsterdam.

The Procurator-General at the
Supreme Court of the Netherlands

A-G

20/02827

Signature Conclusion P.G.

Signatures

Vias, Prof. P.