ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP, S.A. and TERRA RAF TRANS TRAIDING Ltd.

v.

REPUBLIC OF KAZAKHSTAN

SCC Arbitration V (116/2010)

I. INTRODUCTION

1. I have been asked by the Republic of Kazakhstan (ROK) to render an expert opinion on certain issues relating to the recognition and enforcement of an award rendered in the above-referenced arbitration.

2. In that arbitration (the ECT Arbitration), the tribunal rendered an Award in favor of Claimants, Anatolie Stati, Gabriel Stati, Ascom Group, S.A. and Terra Raf Trans Trading (the Stati Parties), and against ROK, under the Energy Charter Treaty (ECT). The Award was issued on December 19, 2013 in the amount of approx. USD 500 million.

3. The Stati Parties have instituted public actions to enforce the Award in the courts of the United Kingdom, the United States, Belgium, the Netherlands, Luxembourg, and Italy. I understand that actions related in some way to the Award are currently pending in all of these jurisdictions.

4. ROK has challenged recognition and enforcement of the Award on a number of grounds under the New York Convention, including the ground that enforcement would violate public policy. ROK bases its public policy defense on the contention that the Award in this case was fraudulently obtained. It supports this contention on the basis of facts that came to its attention after the Award had been rendered, and more specifically during and after its first action for annulment of the Award in the courts of Sweden, the seat of arbitration.[1]

5. In the enforcement proceedings instituted by the Stati Parties in the United Kingdom, the High Court found, after a two-day contested hearing in which substantial fact and expert evidence was presented, that ROK had established a *prima facie* case that the Award was obtained by fraud. Specifically, the High Court stated:

[1] Judgment, The Republic of Kazakhstan v. Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd., Case no. T 2675-14 (Svea Court of Appeal, Dec. 9, 2016).

I hold … that there is a sufficient prima facie case that the Award was obtained by fraud.[2]

On that basis, the High Court ordered a full trial on the fraud issue. When the Stati Parties sought to discontinue the UK enforcement proceedings, the High Court initially denied that request. But that ruling was overturned in the Court of Appeal, and the UK enforcement proceedings were terminated.

6. I have been asked to address in this Opinion the following four questions:

   (a) first, whether, under the New York Convention, in the face of credible evidence of fraud in the procurement of an award, an enforcing court should conduct a searching inquiry into the matter
   (b) second, whether, under the New York Convention, the refusal by a court of the seat (in this case Stockholm) to set aside the Award on public policy grounds forecloses a court of another jurisdiction from denying enforcement of the Award on public policy grounds
   (c) third, whether the New York Convention prescribes a particular standard of proof for allegations of fraud
   (d) fourth, whether there exists in this case credible evidence of fraud and a causal link between fraud and the outcome of the arbitration

7. In conducting this inquiry, I reviewed the following documents:

   - Award, Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. Vs. The Republic of Kazakhstan, SCC Arbitration V (116/2010), 19 December 2013 (as corrected on 17 January 2014)
   - Judgment, The Republic of Kazakhstan v. Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd., Case no. T 2675-14 (Svea Court of Appeal, Dec. 9, 2016).
   - Judgment, Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd., Case no. CL-2014-000070 (June 6, 2017)
   - Expert Report Of Dr. Patrik Schöldström (Jan. 13, 2017)
   - Declaration of Philip Maitland Carrington (Apr. 1, 2019)
   - Declaration of Matthew H. Kirtland (May 9, 2019)
   - Declaration of Alexander Foerster (May 10, 2019)

[2] Judgment, Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd., Case no. CL-2014-000070 (June 6, 2017), para. 92. Justice Knowles added:

> In my judgment there is the necessary strength of prima facie case that the alleged fraud would have made a difference to the Tribunal.

Id., para. 48.

- Correspondence between Stati Parties and KPMG (February to March 2016; July to October 2019) (the KPMG Correspondence)
- Report from PricewaterhouseCoopers LLP (PwC Report) on the KPMG Correspondence January 21, 2020)

8. For the reasons set out below, I conclude that (a) in the face of credible evidence of fraud in the procurement of an award, an enforcing court, under the New York Convention, should conduct a searching inquiry into the matter, (b) under the New York Convention, the refusal by a court of the seat to set aside an award on public policy grounds does not bar a court of another jurisdiction from denying enforcement of that award on public policy grounds, (c) the New York Convention prescribes no particular standard of proof of allegations of fraud, and (d) there exists in this case credible evidence of fraud and a causal link between such fraud and the outcome of the arbitration.

II. BACKGROUND AND QUALIFICATIONS

9. I am Professor of Law at Columbia Law School in New York, where I hold the Jean Monnet Professorship in European Union Law and the Walter Gellhorn Professorship. As a member of the Columbia faculty since 1975, I have taught, among others, the following subjects: international commercial and investment arbitration, transnational litigation, conflicts of law, European Union law, WTO law and contracts.

10. I am a member of the bar of the State of New York and formerly an associate in the New York office of the law firm Davis Polk & Wardwell. I hold a B.A. degree from Yale College and a J.D. degree from Yale Law School.

11. At Columbia, I founded and direct the Center for International Commercial and Investment Arbitration (CICIA). I also founded and was the first director of the European Legal Studies Center (ELSC). I am co-editor-in-chief of the *American Review of International Arbitration* (ARIA), which is produced at Columbia, as well as President of the Executive Editorial Board of the *Columbia Journal of European Law* (CJEL), which I also established.

12. I have other regular teaching engagements at the Institut des Sciences Politiques (Sciences Po) in Paris, where I am *professeur affilié* and teach in the LL.M. program in international dispute resolution. I also teach regularly in the Masters of International Dispute Settlement (MIDS) program at the University of Geneva. In addition, I teach as an adjunct professor at the Georgetown University Law Center in Washington, D.C.

13. Over the past 40 years, I have served regularly as international arbitrator in both commercial and investor-State cases, sitting in scores of cases, and have frequently rendered expert opinions for courts and arbitral tribunals on the law of international arbitration, transnational litigation, European Union law and the law of multiple European jurisdictions.

14. I am Chief Reporter of the American Law Institute's (ALI) Restatement of the U.S. Law of International Commercial and Investment Arbitration, which received final approval in May 2019. I am also the author of numerous books, including most recently the UNCITRAL Guide to the New York Convention (co-authored with E. Gaillard) (2016); International Arbitration and Private International law (General Course in Private International Law of Hague Academy of International Law) published by the Academy in *Recueil des cours* of Academy and in paperback by Brill Nijhoff) (2017); Interpretation and Application of the New York Convention by National Courts (Springer Pub. 2017); Mandatory Rules in International Arbitration (2d. ed., forthcoming Juris Pub. 2020); Cases and Materials on European Union Law (West Pub. 4th ed. 2016) (co-authored).

15. I am the author of numerous articles, including *The Energy Charter Treaty and European Union Law*, in International Arbitration in the Energy Sector (M. Scherer, ed., 2018); *What Does it Mean to be "Pro-Arbitration?*," 34 Arb. Int'l 341 (2018); *The Role of National Courts at the Threshold of Arbitration*, 28 Am. Rev. Int'l Arb. 291 (2018*); European Union Law as a Jurisdictional and Substantive Defense to Investor-State Liability* (in F. Ferrari, ed., The Impact of EU Law on International Arbitration, Juris Pub. 2017); *Res Judicata in International Arbitration*, in A. Bjorklund, F. Ferrari & S. Kroll, eds., Cambridge Compendium of International Commercial and Investment Arbitration (forthcoming 2020*); International Standards as a Choice of Law Option in International Arbitration* (28 Am. Rev. Int'l Arb. 423 (2017); *The Yukos Annulment: Answered and Unanswered Questions*, 27 Am. Rev. Int'l Arb. 1 (2016); *Limits to Party Autonomy in Composition of the Arbitral Panel*, in Limits to Party Autonomy in International Commercial Arbitration 83 (F. Ferrari, ed., Juris Pub. 2016*); International Commercial Arbitration: Present Challenges and Future Prospects*: Festschrift for John Beechey (2017); *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012); *Navigating EU Law and the Law of International Arbitration*, 28 Arb. Int'l 397 (2012); *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367 (2012).

16. As a member of the international arbitration community, I hold and have held positions in numerous international arbitration institutions. These include as chair of the New York International Arbitration Center (NYIAC), member of the Governing Board of the International Court of Arbitration at the International Chamber of Commerce (ICC) in Paris, and member of the ICC's Standing Committee and International Arbitration Commission. At the American Arbitration Association (AAA), I am a member of the

Council, and at the Center for Conflict Prevention and Resolution (CPR) a member of the Board of Directors.

17. I hold honorary degrees from the University of Fribourg, Switzerland; Universitê de Versailles-St. Quentin, France; Universidad Cesar Vallejo, Lima, Peru; and Universidade Nova de Lisboa, Lisbon, Portugal.

III. ANALYSIS

18. In this section, I provide my reasons for reaching the conclusions set out in paragraph 8, *supra*.

(a) whether, under the New York Convention, in the face of credible claims of fraud in the procurement of an award, an enforcing court should conduct a searching inquiry into the matter

19. Because the Award was made in Sweden, its enforcement outside of Sweden is subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), as interpreted in a particular jurisdiction. The Convention essentially requires a court to enforce a foreign award unless one or more exceptions to that obligation set out in the Convention is satisfied.

20. Among the bases on which an award may be denied enforcement under the Convention is that enforcement of the award would violate public policy,[3] broadly understood as violating basic principles of morality and justice in the jurisdiction where enforcement is sought.[4]

21. The Convention's public policy exception is to be narrowly construed, that is, limited to those exceptional circumstances in which enforcement of an award would offend a jurisdiction's most fundamental values.[5] Adopting a suitably narrow understanding of public policy in this context is seen as part of a larger "pro-arbitration" philosophy that favors the enforcement of both arbitration agreements and arbitral awards. It is rightly feared that too expansive a notion of public policy would threaten arbitration's effectiveness as a means of international dispute resolution. Moreover, it is the burden

[3] New York Convention, art. V(2)(b).

[4] *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, Court of Appeals, Second Circuit, United States of America, 508 F.2d 969, 974 (2nd Circ. 1974).

[5] *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd.*, Federal Court, Australia, 23 March 2012, [2012] FCA 276, para. 105; *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, Court of Final Appeal, Hong Kong, 9 February 1999, [1999] 2 HKC 205, pgs. 12, 13; *OAO "Gazprom" v. The Republic of Lithuania, Ministry of Energy of the Republic of Lithuania*, Supreme Court of Lithuania, Civil case No. 3K-7-458-701/2015, 23 October 2015, para. 73.

of the party invoking a Convention defense to enforcement to prove that the defense is established.

22. Nevertheless, while international arbitral awards are only very exceptionally denied enforcement on public policy grounds, there are circumstances in which denial of enforcement on those grounds is warranted. Commission of fraud in procurement of an award is one such circumstance.[6]

23. Not only is fraud contrary in some general sense to basic values of morality and justice, but it is inimical to arbitration's ability to achieve its very own fundamental purpose, namely to ensure the fair and just adjudication of disputes. In order for arbitration to be viewed as a legitimate means of resolving international disputes, its reputation for the regularity and integrity of its proceedings must not be compromised, as it is when an award is obtained on the basis of evidence known to be fraudulent.

24. While it is ordinarily "pro-arbitration" to give effect to international arbitral awards, there are occasional awards that do not merit enforcement, and it is decidedly not "pro-arbitration" to enforce them. It is for that very reason that the drafters of the New York Convention, who were unquestionably "pro-arbitration" in attitude, provided grounds for denying enforcement of awards, including when their enforcement would run afoul of public policy.

25. That enforcement of an award obtained by fraud is contrary to public policy is well-established in case law across jurisdictions, including, for example, the United States,[7]

[6] *Bloomberry Resorts and Hotels Inc and another v. Global Gaming Philippines LLC and another* [2020] SGHC 01, paras. 97, 98; *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62, para. 48; *Serena Equity Limited v. Fincantieri S.p.A.*, Gerechtshof, Amsterdam, Case No. 200.219.927/01, 9 October 2018.

[7] *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria,* 844 F.3d 281 (D.C. Cir. 2016) (enforcing an Award based on a contract tainted by fraud violates public policy); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) ("Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud. Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration."); *ARMA, S.R.O. v. BAE Systems Overseas, Inc.*, 961 F.Supp.2d 245, 254–55 (D.D.C. 2013) (adopting three-pronged test).

England,[8] Australia,[9] France,[10] Germany,[11] Lithuania,[12] the Netherlands,[13] and Singapore.[14] So widely held is the proposition that enforcement of an award obtained by fraud is contrary to public policy that it has become a virtually transnational principle of international arbitration law.

26. Thus, although, as noted, it is "pro-arbitration" for national courts to give effect to arbitral awards, it is *not* "pro-arbitration," but rather "anti-arbitration," for national courts to enforce an arbitral award procured by fraud.

27. Justice Knowles in the English High Court case referred to earlier put the matter nicely:

> It will do nothing for the integrity of arbitration as a process or its supervision by the Courts, or the New York Convention, or for the enforcement of arbitration awards in various countries, if the fraud allegations in the present case are not

[8] *IPCO (Nigeria) v. Nigerian Nat'l Petrol. Corp.* [2015] EWCA (Civ) 1144 (Eng.) ("The proposition that fraud vitiates the whole award . . . finds support in English law principles."); *IPCO (Nigeria) v. Nigerian Nat'l Petrol. Corp.* [2014] EWHC (Comm) 576 (Eng.) (holding that fraud is sufficient to refuse to enforce any part of an award because fraud against the tribunal "undermines the validity of the whole Award"); *HJ Heinz Co. v. EFL Inc* [2010] EWHC (Comm) 1203 (Eng.) (holding that in the case of fraud, "upon analysis of the facts an approach more favourable to the party defrauded in respect of what is due . . . may be adopted"); *Double K Oil Prods. 1996 Ltd. v. Neste Oil OYJ* [2009] EWHC (Comm) 3380, ¶ 15 (Eng.) ("The clearest guidance in the authorities as to when the enforcement of an arbitral award would be contrary to (English) public policy on the basis that it was obtained by fraud is to be found in the jurisprudence on [referring to] "the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."); *Westacre Inv. Inc. v. Jugoimport-SPDR Holding Co Ltd* [2000] QB (CA) 288 (Eng.) (holding that where there is decisive evidence of fraud unavailable to party at the time of the trial would justify refusal of enforcement of the award).

[9] *Traxys Eur SA v Balaji Coke Indus Pvt Ltd (No 2)* [2012] FCA 276 (23 March 2013) (Austl.) (holding that enforcement of an award that was induced or affected by fraud or corruption would be contrary to public policy and that a court may refuse enforce the tainted award)

[10] Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 16, 2018, 15/21703 (Fr.) (annulling an award because the title to property was obtained through fraudulent administrative authorization)

[11] Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 2013, III ZB 40/12 (Ger.) (recognizing that an award obtained through Claimant's procedural fraud would be a ground to refuse enforcement under art. V(2)(B) of the New York Convention)

[12] *OAO "Gazprom" v. Repub. of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Sup. Ct. Lith. Oct. 23, 2015) (holding that the concept of "public policy" should be interpreted as "international public policy" and "violation of public policy exists . . . when the arbitral award or arbitral agreement has been obtained by coercion, fraud, threat, etc.")

[13] Hof Amsterdam 9 september 2018, GHAMS:2018:3755, 200.219.927/01 m.nt. (Serena Equity Ltd./Fincantieri S.p.A.) (Neth.) ("[P]ublic policy precludes enforcement only in exceptional circumstances. Fraud itself constitutes such a such a circumstance and public policy may prevent the enforcement of a foreign arbitration award rendered under the influence of fraud.")

[14] *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (SGH, Jan. 3, 2020) (Sing.) ("Fraud, corruption and bribery would generally fall within the rubric of being "contrary to public policy. . . . Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside." (internal citations omitted)); *Sui S. Gas Co. v. Habibullah Coastal Power Co. (Pte)*, No. 248/2009 (SGHC, Feb. 23, 2010) (Sing.) (finding that "egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice[,]" would violate public policy and justify setting aside of award)

examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination.[15]

28. For this reason, an enforcing court, faced with credible evidence of fraud in the obtaining of an award, may be expected to conduct a meaningful inquiry into that matter. The seriousness of fraud in the obtaining of an award demands nothing less. In the absence of such an investigation, a responsible determination as to whether enforcement of the award would offend a jurisdiction's public policy cannot properly be made.

29. In the present case, conducting a serious inquiry into fraud is all the more important given that the Swedish court in which annulment of the Award was sought appears to have made no determination as to whether fraud had in fact been committed.[16] Thus, the question whether the Award in this case had been procured through fraud has never been determined on the merits, except in the prima facie findings of the English High Court. As correctly observed by Justice Knowles in the English High Court, justice requires that the allegations of fraud in this case be examined at a trial and decided on their merits, the Swedish judgment notwithstanding. Also significant in this context is the fact that the Swedish court did not have before it a complete record of the relevant facts, given that as discussed below further evidence of the fraud has been discovered after the Swedish court's denial of annulment in December 2016. For example, the Stati Parties' accounting firm, KPMG, withdrawing its audit reports for the Stati Parties' financial statements due to their falsity occurred in August 2019, nearly two years after the Swedish court proceedings were concluded. In addition, from the information shown to me, I understand that material correspondence between the Stati Parties and KPMG was not disclosed by the Stati Parties during the pendency of the Swedish court proceedings. This correspondence reveals that KPMG raised questions about the fraud in 2016 but that the Stati Parties appear to have evaded these questions and their consequences (until August 2019 when KPMG withdrew their audit reports).[17]

30. Making a searching inquiry into fraud in the obtaining of an award, once credible evidence of fraud is adduced, must not be confused with reexamining the merits of an award. It is elementary that enforcing courts may not conduct de novo review of the merits of an award. But an inquiry into fraud in the obtaining of an award is altogether different from revisiting the merits of a dispute. Such an inquiry is required precisely to ensure that according recognition and enforcement of an award on the merits is warranted.

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[15] See note 2, *supra*, at para. 93.

[16] Judgement, The Republic of Kazakhstan v. Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd., Case no. T 2675-14, decision of the Svea Court of Appeal dated 9 December 2016, p. 45.

[17] See para. 46 *et seq.*, *supra*.

(b) Whether, under the New York Convention, the refusal by a court of the seat to set aside an award on public policy grounds forecloses a court of another jurisdiction from denying enforcement of the award on public policy grounds

31. As noted above, a court of the seat in this case – Sweden – rejected ROK's application for annulment of the present Award. The court found, *inter alia,* that enforcement of the Award in this case would not sufficiently offend Swedish public policy to justify a refusal of enforcement.

32. I am asked to address here the question of the effect to be given to the Swedish judgment in an action for enforcement of the Award in another jurisdiction.

33. Generally speaking, the seat of arbitration is viewed as having "primary jurisdiction" over the arbitration. As a result, its rulings on the validity and enforceability of an award are generally entitled to serious consideration by "secondary jurisdictions," i.e., foreign jurisdictions in which an award is brought for enforcement. For example, a ruling by a court of primary jurisdiction rejecting challenges to an award will in most circumstances carry considerable weight when a similar challenge is raised in an action to enforce the award in a secondary jurisdiction. In jurisdictions that practice collateral estoppel, or issue preclusion, such a ruling may even have preclusive effect when the challenge resurfaces in an enforcement action in a secondary jurisdiction.

34. However, the same cannot be said of challenges based on violation of public policy. The New York Convention expressly provides that a court may deny enforcement of an award if enforcement would violate the public policy of "the country where recognition and enforcement is sought."[18] In other words, a court before which a public policy defense is raised to defeat enforcement is instructed to apply *its own* public policy, not the public policy of another jurisdiction, including the seat.[19] As is well known, the content of public

[18] New York Convention, art. V(2)(b).

[19] See Restatement of U.S. Law of International Commercial and Investment Arbitration (proposed final draft, Apr. 24, 2019)

> § 4.8. Effect of Prior Judicial Determinations on the Availability of Post-Award
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> *d. Effect of the different law applied in the prior determination.* Whether a prior judicial determination is given preclusive effect in a post-award action may in some circumstances depend on the law that governed the determination in the prior action. With respect to certain grounds for granting or denying post-award relief—such as the invalidity of the arbitration agreement—the law applicable to the ground is presumably the same regardless of whether the ground is raised to defeat a motion to compel arbitration, to set aside the resulting award, or to resist the award's confirmation, recognition, or enforcement. When the applicable law is identical, the prior determination can readily be given preclusive effect. The same may be said of claims that a party was denied an opportunity to be heard, that a tribunal exceeded its authority, or that a tribunal impermissibly disregarded party agreement on tribunal composition or arbitral procedure.

policy varies from jurisdiction to jurisdiction. The drafters of the Convention thus took pains to ensure that no jurisdiction could impose its public policy on any other jurisdiction.

35. Much the same may be said of non-arbitrability of a dispute as a defense to enforcement under the Convention.[20] The Convention specifically calls upon courts, when entertaining a request to deny enforcement of an arbitral award on the basis of the non-arbitrability of the underlying claim, to apply its own non-arbitrability principles, not those of any other jurisdiction, including the seat.

36. In this important respect, both the public policy and arbitrability defenses to enforcement of foreign awards are treated very differently from all other New York Convention defenses.

37. Thus, the decision whether enforcement of the present Award would offend the public policy of a particular jurisdiction should be unaffected by a finding that the Award does or does not offend the public policy of another jurisdiction, in this case Sweden. In my view, this must be even more so here since the Swedish annulment court did not have the benefit of a complete record, as material evidence, such as KPMG's withdrawal of the audit reports, did not exist at the time, or was withheld by the Stati Parties.

38. Under the New York Convention, the courts of a particular jurisdiction should consult only that jurisdiction's public policy, and the public policy of no other jurisdiction, in adjudicating a public policy defense raised under Art. V(2)(b) of the Convention. In other words, the court's public policy is to be made entirely independently.

39. That is exactly the position taken by the English High Court in connection with the present Award. The Stati Parties argued to the High Court that it was bound, so far as the public policy defense to enforcement is concerned, by the Swedish courts' determination that enforcement of the Award would not be repugnant to Swedish public policy. Justice Knowles disagreed, finding that "[n]o court has decided the question whether there has been the fraud alleged … Neither the Swedish Court nor the US Court nor English Court has, although material has been put before those Courts that would allow them to decide that question."[21] However, Justice Knowles went even further:

> However, with respect to other grounds, the law governing the availability of post-award relief requires application of law that is different from the law applied by the court that previously entertained the analogous ground. *Different courts may be asked at different stages in the arbitration life cycle whether a dispute is arbitrable or whether enforcement of an arbitration agreement or arbitral award would violate public policy. In principle, each court faced with these contentions applies its own domestic law of non-arbitrability and public policy (emphasis added).*

[20] New York Convention, art. V(2)(a).

[21] Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd., Case no. CL-2014-000070 (June 6, 2017), para. 80.

> The New York Convention is addressed, at Article V(2)(b), to the public policy of the country of enforcement. Relevant public policy can and does differ from country to country. It is correct to say that the Swedish Court did not decide whether under English law public policy required the application to enforce the Award in this jurisdiction to be refused.[22]
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> If, as I should, I take the decision of the Swedish Court as showing Swedish public policy in the context of this case then I find, as a matter of law, that English public policy is not the same. [Counsel for ROK] put[] it this way, and I agree: "It is apparent from the outcome in Sweden alone that the content of Swedish public policy must be different from that of its English counterpart.[23]
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> [E]ven had the basis of an issue estoppel been made out, the English court would still have to decide whether enforcement of the Award should be permitted because English public order must ultimately be a matter for the English Court.[24]

40. In short, the English High Court specifically (and correctly) ruled that the conformity of the Award to Swedish public policy had no bearing on the question whether enforcement of the Award would offend the public policy of the UK. It found the distinct possibility that enforcement of the Award would offend UK public policy to be sufficiently great to warrant a trial of that issue.

41. I thus conclude that, under the New York Convention, a court should determine whether enforcement of the present Award would offend public policy and should accordingly be denied, solely on the basis of the respective jurisdiction's public policy, without reference to Swedish public policy and indeed without reference to the court of any other jurisdiction.

(c) whether the New York Convention prescribes a particular standard of proof of allegations of fraud

42. While the New York Convention prescribes violation of public policy as a ground for denying enforcement of an award, and while enforcing an award obtained by fraud is a public policy violation in most jurisdictions, the Convention does not prescribe a standard of proof of allegations of fraud.

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[22] *Id*., para. 84.
[23] *Id*., para. 86.
[24] Id., para. 87.

43. Thus, nothing in the Convention suggests that fraud, as a public policy violation, must be "manifest," established by "clear and convincing evidence" or "beyond a reasonable doubt," or established against the standards of criminal law, which typically are stricter than the standards applied in civil law.

44. The only proper basis for determining the standard of proof required to establish fraud would be the domestic law of the jurisdiction in which recognition and enforcement is sought. That follows from the fact that, as set forth above, whether enforcement under the New York Convention of an award would offend public policy is determined under the law of the place where enforcement is sought.

(d) whether there exists credible evidence of fraud in this case and a causal link between fraud and the outcome of the arbitration

45. I concluded above that an enforcing court, faced with credible evidence of fraud in the procurement of an award, must conduct a searching inquiry into that matter.

46. Based on the information provided to me, I have no doubt that in this case there exists credible evidence of fraud in procurement of the Award. In particular, I note the following information (which for convenience I have cross-referenced to the recitation of this information in the PwC Report):

    a. The Republic of Kazakhstan's case on fraud against the Stati Parties is grounded on the alleged fraudulent extraction of funds through inflated costs, concealed by fraudulent financial reporting. (¶ 9)

    b. The Stati Parties fraudulently obtained audit reports from KPMG opining that the Financial Statements of Tristan, KPM, and TNG presented fairly, in all material respects, the financial position of Tristan, KPM and TNG, when in fact they were materially misstated. (¶ 10)

    c. The Stati Parties used these audited, yet false, Financial Statements to raise finance from investors. (¶ 11)

    d. Based on the evidence and arguments made the Stati Parties, the Tribunal relied on an indicative bid that the Stati Parties obtained from a potential purchaser (the "Indicative Bid"), which the Tribunal considered to be "*the relatively best source of information for the valuation.*"[25] The Stati Parties obtained the Indicative Bid with the alleged fraudulent financial reporting and fraudulently obtained audit

[25] ECT Award, paragraph 1747.

reports. In the ECT Arbitration, the Stati Parties then argued that the Tribunal should rely on the $199 million valuation of the LPG Plant in the Indicative Bid. The Tribunal in fact did so rely and awarded the Stati Parties $199 million for the LPG Plant. (¶¶ 14-16)

e. In 2016, while the Swedish annulment proceedings were ongoing, KPMG issued information requests to the Stati Parties concerning the alleged fraud, but the Stati Parties made no response. The Stati Parties did not disclose this correspondence to the Swedish courts. (¶¶ 22-26)

f. In July 2019, KPMG was provided with additional information in the form of *inter alia* a deposition under oath of the Stati Parties' former CFO Artur Lungu who confirmed that the management of the Stati Parties had provided materially false information to KPMG, and that the Stati Parties' resulting financial statements were materially false. Further correspondence between KPMG and the Stati Parties transpired. (¶ 27)

g. In a 21 August 2019 letter from KPMG to the Stati Parties, KPMG stated that, having received no response to their questions and having completed their own independent assessment, it concluded that the omissions in the annual and interim financial statements of TNG were "*material*" to the Financial Statements. KPMG also noted that the additional information obtained by KPMG reflects *"that the management of [the Stati parties] made misrepresentations to KPMG Audit LLC"*. (¶ 27)

47. This information, in my view, confirms the existence of credible evidence of fraud in the procuring of the Award. My opinion is further supported by the following conclusions reached by PwC in its Report:

a. There should be no further or future reliance on the KPMG audit reports (¶¶ 28-32), and this should extend to all of the Stati Parties' financial information (¶¶ 39-40).

b. The actions taken by KPMG in withdrawing their audit reports are significant and extremely rare ((¶ 33-36)

c. The withdrawal by KPMG of its audit reports renders the Financial Statements entirely unreliable (¶ 37-38)

d. The conduct of the Stati Parties raises "a number of potential 'red-flags' in relation to broader money laundering issues." (¶¶ 43-44)

48. I have also considered, once again on the basis of the information provided to me, whether there exists a sufficient causal relationship between the fraud alleged in this case and the outcome of the arbitration. In my judgment, based in part on my experience as arbitrator, the required causal connection is in this case established.

49. The actions taken by KPMG undermine confidence not only in the reliability of the Stati Parties' financial information, but also in anything derived from or based on that information, including written and oral testimony, expert opinions and statements of counsel. This evidently affected the ECT Arbitration and the outcome as a whole, including questions of jurisdiction, liability and damages.

50. The same is true of the $199 million amount of compensation that the Tribunal awarded the Stati Parties. This award was based on the Indicative Bid. If the Stati Parties in fact obtained the Indicative Bid on the basis of the falsified financial statements for which audit opinions had been fraudulently obtained, then a clear line of causation can be drawn between the alleged fraud and the Award.

51. Justice Knowles in the English High Court considered the same question and came to the same conclusion, putting it as follows:

> If construction costs were … fraudulently inflated by the Claimants … then, because the … Indicative Bid valued the LPG Plant … there is the clearest argument that the … Indicative Bid would have been lower.[26]
>
> [I]n asking the Tribunal to rely on the … Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.[27]

IV. CONCLUSIONS

52. Consideration of the law and the facts made known to me leads me to the following conclusions.

53. First, an award procured by fraud is an award whose enforcement should be denied under the New York Convention's public policy defense. To be sure, an inquiry into whether enforcement of an award should be denied under the public policy defense to

[26] Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd., Case no. CL-2014-000070 (June 6, 2017), para. 43.
[27] Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd., Case no. CL-2014-000070 (June 6, 2017), para. 48.

enforcement must be a narrow and focused one. Giving public policy, within the meaning of the Convention, a narrow interpretation is one of the ways in which a jurisdiction manifests the "pro-arbitration" attitude that the Convention seeks to promote.

54. However, the New York Convention provides defenses to enforcement – and a public policy defense in particular – precisely because it would *not* be in arbitration's interest to enforce an award that offends fundamental values of morality and justice of the place where enforcement is sought. A court asked to enforce an award procured by fraud should deny enforcement under the New York Convention's public policy exception, and doing so would in fact be the "pro-arbitration" step to take.

55. For this reason, I conclude that an enforcing court, faced with credible evidence of fraud, must conduct a searching inquiry into whether those allegations are founded. This is so even though the party invoking the public defense bears the burden of establishing it. The New York Convention demands nothing less, since the integrity of international arbitration depends on such allegations being taken very seriously, especially when evidence of fraud is exposed only after an award is issued.

56. The circumstances of this case – notably, the seriousness of fraud under the public policy of most jurisdictions, the credible evidence of fraud and causation in this case, and the absence of a prior merits determination by the Swedish court that fraud did or did not occur – militate in favor of a court conducting a searching investigation into the fraud allegations.

57. Second, in applying the public policy defense to enforcement under the Convention, a court should look specifically at the public policy of the jurisdiction of which it forms a part, and take no guidance from the public policy of any other jurisdiction, including but not limited to that of the seat. This follows from the wording of the Convention which directs courts to the public policy of "the country where recognition and enforcement is sought." But it also makes eminent sense. Since States do not all conceive of and implement public policy in the same way, no State should be expected to apply the public policy of another jurisdiction in place of its own.

58. Accordingly, the question whether enforcement of an award procured by the kind of fraud established in the case at hand would or would not offend public policy, within the meaning of the Convention, is to be determined by reference to the public policy of the jurisdiction in question and no other. Determinations of public policy by courts of other jurisdictions have no role in the analysis.

59. Third, the New York Convention imposes no particular standard of proof of fraud. If any particular standard of proof is prescribed, it can only be prescribed by the law of the jurisdiction where enforcement is sought.

60. Finally, in my judgment and experience, and on the basis of facts made known to me, it cannot be doubted that there exist in this case both credible evidence of fraud and a sufficient connection between such fraud and the outcome of the arbitration.

Respectfully submitted,

George A. Bermann

George A. Bermann

January 21, 2020