ORAL ARGUMENT SCHEDULED FOR NOVEMBER 28, 2018

No. 18-7047

IN THE
United States Court of Appeals
for the District of Columbia Circuit

ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP, S.A., AND TERRA RAF TRANS TRAIDING LTD.,

Petitioners-Appellees,

v.

REPUBLIC OF KAZAKHSTAN,

Respondent-Appellant.

Appeal from the United States District Court,
District of Columbia
Civil Action No. 1:14-cv-01638-ABJ
Judge Amy Berman Jackson, Presiding

BRIEF FOR APPELLANT

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October 15, 2018 (Final Brief)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellant the Republic of Kazakhstan files this certificate regarding parties, rulings, and related cases.

A. PARTIES AND AMICI

The parties in this case are as follows:

Republic of Kazakhstan

Anatolie Stati

Gabriel Stati

Ascom Group, S.A.

Terra Raf Trans Traiding Ltd.

B. RULINGS UNDER REVIEW

The rulings under review are the Order and Memorandum Opinion, JA752-84, issued on March 23, 2018 by the district court in *Anatolie Stati, et al. v. Republic of Kazakhstan*, No. 14-cv-1638-ABJ (D.D.C.), and all prior orders and decisions incorporated into that final order, including without limitation the following:

1. Order Denying Respondent's Motion for Leave to File Additional Grounds in Support of its Opposition to the Petition to Confirm Arbitral Award, May 11, 2016, Hon. Amy Berman Jackson, JA376-79; and

2. Memorandum Opinion and Order, Aug. 5, 2016, Hon. Amy Berman Jackson, JA455-76.

C. RELATED CASES

The following related case is currently proceeding in the United States District Court for the District of Columbia: *Republic of Kazakhstan v. Anatolie Stati, et al.*, No. 1:17-cv-02067-ABJ (Oct. 5, 2017).

CORPORATE DISCLOSURE STATEMENT

Appellant the Republic of Kazakhstan is a sovereign nation. Fed. R. App. P. 26.1(a) and Local Rule 26.1 therefore do not apply to it.

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GLOSSARY

Award	$498 million award issued against Kazakhstan in favor of Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd.
ECT	Energy Charter Treaty
Kazakhstan	Appellant Republic of Kazakhstan
KMG Bid	$199 million bid placed by KMG to purchase Stati Parties' liquefied petroleum gas plant
KPM	Kazpolmunai
LPG Plant	Stati Parties' liquefied petroleum gas plant
Panel	Stockholm Chamber of Commerce panel convened to arbitrate Stati Parties' dispute with Kazakhstan
Petition	Stati Parties' Petition for Arbitration
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Request	Request for Arbitration filed by the Stati Parties on July 26, 2010
SCC	Stockholm Chamber of Commerce
Stati Parties	Appellees Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd.
TNG	Tolkynneftegas

JURISDICTION

The district court exercised jurisdiction under 9 U.S.C. § 203. On March 23, 2018, the district court granted appellees' Petition to Confirm the arbitral award. JA752-84. Petitioner/appellant Republic of Kazakhstan ("Kazakhstan") timely noticed an appeal from that final judgment on April 9, 2018. JA785. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred by confirming the arbitration award even though the institution administering the arbitration usurped Kazakhstan's right to appoint an arbitrator without providing any notice or opportunity to respond, in violation of the parties' alleged arbitration agreement and basic principles of due process.

2. Whether the district court erred by confirming the arbitration award even though petitioners failed to observe an agreed-upon settlement period, compliance with which was a mandatory condition of Kazakhstan's consent to arbitrate.

3. Whether the district court erred by denying Kazakhstan its right to present proof that the arbitration award resulted from petitioners' fraud, even though that proof would establish a defense to confirmation.

STATUTES AND REGULATIONS

The addendum contains the text of 9 U.S.C. § 207, as well as pertinent provisions of the Energy Charter Treaty and the arbitration rules of the Stockholm Chamber of Commerce.

INTRODUCTION

Kazakhstan is the world's ninth largest country. A secular, constitutional republic with a diverse cultural heritage, Kazakhstan is also Central Asia's dominant economic force, accounting for sixty percent of the region's gross domestic product. The majority of that economic activity stems from Kazakhstan's substantial oil, gas, and mineral resources.[1]

In 2008, the President of Moldova alerted the President of Kazakhstan that two Moldovan multimillionaires, Anatolie Stati and his son, Gabriel—large investors in Kazakh oil and gas—had illegally concealed profits in offshore territories and funneled their Kazakh earnings into investments in countries subject to United Nations sanctions. Over the following year and a half, the Kazakh government investigated and ultimately terminated the investment contracts of the Statis and their companies. Just five days later, petitioners/appellees (the "Stati Parties") initiated an arbitration under the Energy Charter Treaty ("ECT"), Dec.

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1 *See generally* CIA, *Kazakhstan, CIA World Factbook* (https://tinyurl.com/5ejoqz); *Explore Almaty, Kazakhstan* (www.almaty-kazakhstan.net/kazakhstan/).

17, 1994, I.E.L. III-0068, that resulted in the $498 million award (the "Award") that the district court summarily confirmed in the orders below.

But the arbitration was deeply flawed, and the district court should not have confirmed the resulting Award. To begin with, because the Stati Parties commenced arbitration just five days after the alleged wrong occurred, the tribunal lacked jurisdiction over the dispute. That is because, when Kazakhstan signed the ECT, it consented to arbitrate only those disputes in which the party bringing the action had first sought amicable settlement and observed a three-month settlement period before initiating an arbitration.

The Stati Parties' violation of the ECT compounded an even more egregious error. Before Kazakhstan even entered an appearance, the Stati Parties urged their chosen arbitral institution, the Stockholm Chamber of Commerce (the "SCC"), to strip Kazakhstan of its fundamental right to appoint one of the three arbitrators who would rule on the case. The SCC, ignoring its own rules, the parties' alleged agreement, and basic due process, acceded to that request—without providing ***any*** advance notice to Kazakhstan. That action went to the heart of the arbitration's fairness and rendered the resulting award unenforceable under U.S. law.

Although the SCC's errors suffice to render the award unconfirmable, they were only the beginning. As Kazakhstan discovered while the confirmation proceeding was pending below, the Stati Parties also obtained the arbitral award by

fraud—and, specifically, by falsely inflating the value of their assets through sham, related-party transactions and then using that falsified information to dupe the tribunal into granting them an inflated award. Confirming an award obtained through fraud violates United States public policy, but the district court denied Kazakhstan its right to present that defense, resting on an erroneous holding that any argument based on the asserted fraud would be futile. The district court's order should be reversed and the case remanded so that Kazakhstan can have an opportunity to present proof of the Stati Parties' fraud.

STATEMENT OF THE CASE

A. Factual Background.

Since the fall of the Soviet Union, Kazakhstan has sought to leverage its substantial hydrocarbon deposits for the benefit of its people, including by attracting foreign investment in its oil-and-gas industry. *See* U.S. Dep't of Commerce, *Kazakhstan: Openness to and Restriction on Foreign Investment* (https://tinyurl.com/y9mf9pcn). In the view of the U.S. government, Kazakhstan is now "widely considered to have the best investment climate in [Central Asia]." *Id.*

The Stati Parties are among those who have tried to benefit from that climate. Beginning in 1999, they acquired two companies, Kazpolmunai ("KPM") and Tolkynneftegas ("TNG"), and obtained Kazakhstan's approval to explore and develop various oil and gas fields in the country. JA41-44 ¶¶ 221-249. As part of

their activities in Kazakhstan, the Stati Parties began construction in 2006 of a liquefied petroleum gas plant (the "LPG Plant"). JA44 ¶ 250.

But the Statis' relationship with Kazakhstan took a turn for the worse. In 2008, Kazakhstan's President received a letter from the President of Moldova, the Statis' home country, reporting that the Statis had not only concealed profits in offshore accounts, but also funneled the proceeds of their Kazakh operations into illegal investments in rogue states and territories. JA47 ¶ 291. Kazakhstan opened an investigation, JA48 ¶ 296, and eventually terminated KPM and TNG's subsoil use contracts entirely on July 21, 2010. JA54 ¶ 611.

B. The Arbitration.

1. The SCC Strips Kazakhstan Of Its Right To Appoint An Arbitrator Without Any Notice.

Just five days later, on July 26, 2010, the Stati Parties filed a Request for Arbitration (the "Request") with the SCC, claiming that Kazakhstan's actions violated its obligations as a signatory to the ECT. JA32 ¶ 6. The ECT, reproduced in pertinent part in the addendum to this brief, provides that under certain specified conditions, each signatory consents to arbitrate energy-related disputes in foreign tribunals. *See generally* ECT, art. 26(1)-(4).

In the Request, the Stati Parties made certain proposals for the composition of the arbitral panel. Specifically, they proposed that the panel should consist of three arbitrators, that each should party be allowed to choose one of the three, and

that the chairman be appointed by agreement of the two selectees. JA129-30 ¶¶ 111-13. They also proposed that if "Kazakhstan fails to appoint an arbitrator or if the two party-appointed arbitrators are unable to agree upon a Chairman, the SCC Board should make the necessary appointment(s) as provided in Article 13(3) of the SCC Arbitration Rules." *Id.*[2] Article 13(3) provides that "[w]here a party fails to appoint arbitrator(s) ***within the stipulated time period***, the Board shall make the appointment." JA211 (emphasis added). The reference to a "stipulated time period" invokes Article 13(1), which states that if the parties do not agree upon a time for naming arbitrators, the "time period [will be] set by the Board." JA210.

Ten days after receiving the Request, on August 5, 2010, the SCC forwarded it to Kazakhstan by courier along with a short cover letter. JA235-37. The letter requested that Kazakhstan submit its Answer by August 26, and specified what the Answer must include:

> Your Answer shall contain comment on the seat of arbitration and on the proposition of the Claimants that the Chairperson be selected by the party-appointed arbitrators. The Answer may be brief.

Id. Despite telling Kazakhstan what its answer ***must*** include, the cover letter did not state: (i) that the SCC had reached a decision as to how the tribunal would be

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[2] The SCC's Arbitration Rules are reproduced at JA200-33. Pertinent provisions also appear in the addendum to this brief.

constituted; (ii) that Kazakhstan should name its chosen arbitrator in its Answer; or (iii) that the SCC had determined when Kazakhstan should do so. *Id.*

Kazakhstan did not receive the Request until August 9, at which point it had merely fifteen days left to provide the comments requested by the SCC—just five more than the SCC had taken to forward the Request itself. *Cf.* 28 U.S.C. § 1608(d) (foreign sovereigns given 60 days after service to respond to complaint); *see generally* JA272 (noting that even retaining counsel can be a "lengthy process" for a foreign sovereign like Kazakhstan). The letter and Request were also in English—not one of Kazakhstan's two official languages, and not a language in which the Stati Parties and the Kazakhstan had ever before communicated. JA91-131; JA235-37. And the SCC's expedited schedule directly contravened the ECT, which provides that no dispute may proceed to arbitration until three months after a signatory has received a formal request for settlement. *See* ECT, art. 26(1)-(2). The Stati Parties never sent a request for settlement, and filed their Request only five days after the grounds for the dispute arose.

When the SCC did not receive a response by August 26, it sent a second letter by courier, extending Kazakhstan's deadline to file its Answer to September 10. JA242. That letter "reminded" Kazakhstan "to submit an Answer in accordance with Article 5 of the SCC Rules and, where appropriate, a Power of Attorney." *Id.* It further informed Kazakhstan "that failure to submit an Answer

does not prevent the arbitration from proceeding." *Id.* As with the prior letter, however, the SCC gave no time frame for Kazakhstan to appoint an arbitrator. Nor did it say the SCC had even decided how the tribunal would be constituted.

On September 13, the Stati Parties submitted an *ex parte* communication to the SCC via email and courier, requesting that the SCC Board immediately appoint an arbitrator in Kazakhstan's stead. JA245. Although that request stated that it was made "pursuant to Article 13(3) of the SCC Rules," that rule, as already noted, authorizes the SCC to make an appointment only where "a party fails to appoint arbitrator(s) within the stipulated time period." JA211. No such time period was ever stipulated by the parties or the SCC. The SCC forwarded the request to Kazakhstan, but this time sent it by registered mail, rather than by courier. JA244. As a result, it was not delivered to the Kazakh Ministry of Justice until September 23. JA247.

That same day, the SCC Board appointed an arbitrator (Sergei N. Lebedev) in Kazakhstan's stead. JA249-50. Five days later, without further communication from the parties, the SCC Board appointed the Chairman of the Arbitral Tribunal. JA252-53. Despite informing the Stati Parties by email, the SCC again sent only hard copies to Kazakhstan. JA249-50, JA252-53.

On December 2, 2010, before the initial scheduling conference in the arbitration, Kazakhstan timely objected to Lebedev's appointment. JA257-58.

Noting that "[a] party's right to appoint its own arbitrator is … fundamental to the fairness of [an arbitration]," Kazakhstan observed that the SCC had usurped that right without consulting Kazakhstan or obtaining its consent, without ever inviting it to select its own arbitrator, and without providing any prior notice of the Stati Parties' request. JA258. It therefore asked that as a remedy, "it be permitted to exercise its right to appoint its own arbitrator." *Id.*

In response, the Stati Parties mischaracterized Kazakhstan's objection as one under SCC Rule 15(1), which allows challenges to an arbitrator's impartiality, independence, or qualifications, and argued that Kazakhstan had not established those grounds. JA260-61. Eight days later, the SCC issued a two-sentence ruling endorsing the Stati Parties' view: because, in its view, Rule 15(1) provided the exclusive grounds for challenge, "[n]o ground for disqualification of Professor Sergei N. Lebedev has been found. The challenge has been dismissed." JA264.[3]

2. The Stati Parties' Failure To Comply With The Settlement-Period Prerequisite.

The SCC's hasty and unnecessary usurpation of Kazakhstan's right to appoint its arbitrator was exacerbated by the Stati Parties' failure to comply with

[3] A Swedish court declined to disturb the determination, finding in part that Kazakhstan's obligations were "sufficiently clear" even though "neither in the order nor in the reminder was it expressly stated that an arbitrator was to be appointed by Kazakhstan." JA685-86.

the ECT's requirement that no arbitration can be instituted until after a 90-day settlement period has passed. In January 2011, Kazakhstan explained to the arbitral tribunal (the "Panel") that the Stati Parties had failed to observe that period, and that the Panel therefore lacked jurisdiction under Article 26 of the ECT. JA283-85. Article 26, which governs dispute resolution, provides that no dispute under the Treaty can be submitted to arbitration unless a party first requests settlement and observes a three-month settlement period. *See* ECT, art. 26(2)(c), (4)(c). As Kazakhstan noted, "if Claimants had acted properly in respecting the three-month notice period … before commencing this Arbitration, the procedural unfairness" that occurred when the SCC appointed an arbitrator for Kazakhstan without prior notice might have been avoided. JA284 n.4.

Kazakhstan expressly reserved its argument that the notice period was "a jurisdictional prerequisite" to arbitration. JA285. Nevertheless, in the hope of obtaining a "practical solution," Kazakhstan proposed a three-month stay of proceedings, during which the parties could seek to settle the dispute. *Id.*

The Stati Parties responded that they were "not willing to accept the proposal set forth in [Kazakhstan's] letter…." JA276. They contended that their failure to abide by the ECT was "of no legal relevance." JA275-76. They also contended that two letters they had sent to Kazakhstan in early 2009—more than a year before Kazakhstan terminated their contracts—triggered the settlement period

for this dispute. *Id.* Nevertheless, they proposed a counteroffer: they would "agree to a sixty day" stay, but only if "Kazakhstan formally withdr[ew] and waive[d] its objection regarding the notice period." JA276. As the Stati Parties would later acknowledge, Kazakhstan expressly declined to do so. JA35; JA279. Despite that, the Panel later determined to stay proceedings for three months instead of dismissing the Stati Parties' action. JA59-61 ¶¶ 820-30.

3. The Arbitral Award.

The Panel issued the Award on December 19, 2013, more than three years after the SCC usurped Kazakhstan's right to appoint its arbitrator. The Panel found that Kazakhstan had failed to treat the Stati Parties fairly and equitably, as required by the ECT. JA64-67 ¶¶ 1085-95. The Panel ordered Kazakhstan to pay roughly $498 million in damages, of which $199 million was reimbursement for the unfinished LPG Plant. JA87 ¶¶ 1856-57, 1859. The Stati Parties and their experts had expressly urged that the LPG Plant should be valued by reference to a $199 million bid (the "KMG Bid") that a state-owned entity called KMG had made to purchase it. *See*, *e.g.*, JA388 n.16. The Panel's Award made clear that its finding on that issue rested entirely on that bid, rather than on anything else any experts or fact witnesses had said. JA81-82 ¶¶ 1746-48.

C. The Petition To Confirm.

On September 30, 2014, the Stati Parties filed their Petition to Confirm (the "Petition"), asking the district court to recognize and confirm the Award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 330 U.N.T.S. 38, as implemented by the Federal Arbitration Act ("FAA"). *See* JA14-25. The Convention provides that recognition of foreign arbitral awards may be refused if the party opposing enforcement "furnishes … proof" establishing one of seven defenses. New York Convention, art. V. The FAA in turn provides that a district court must deny confirmation if "it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207.

On February 26, 2015, Kazakhstan exercised its right and filed an opposition presenting proof of its then-known defenses. Kazakhstan argued, with supporting evidence, that the Award was unconfirmable because, *inter alia*, the SCC had violated its own rules and the parties' agreement by appointing an arbitrator on Kazakhstan's behalf. JA173-84; *see* New York Convention, art. V(1)(d). It further argued that the Panel had lacked jurisdiction entirely because the Stati Parties failed to observe the settlement period before initiating the arbitration. JA164-72; *see* New York Convention, art. V(1)(a), (c). Briefing on these defenses

concluded on May 26, 2015, with the submission of Kazakhstan's Sur-Reply. JA305-31.

D. Kazakhstan Uncovers New Evidence That The Award Resulted From Fraud.

After this initial briefing on the Petition was complete, Kazakhstan began receiving documents relating to a different arbitration involving the LPG Plant that a New York federal court had ordered produced over the Statis' vigorous objections. JA341-49. The documents revealed that the $199 million valuation the Stati Parties urged for the LPG Plant, and that the Panel accepted, was the result of a fraudulent conspiracy engaged in by the Stati Parties.

1. The Stati Parties Fraudulently Inflated The Valuation Of The LPG Plant Through Sham Related-Party Transactions.

During construction of the LPG Plant, the Stati Parties engaged in sham transactions with Perkwood Investments, a dormant, shell company that the Stati Parties owned and controlled. *See* JA397 ¶ 61; JA430 ¶ 42. Those transactions, which falsely inflated the LPG Plant's construction costs, included:

- TNG's "purchase" from Perkwood of $34.5 million worth of equipment for $93 million, which thus overstated TNG's costs by $58.5 million;[4]

[4] JA414; JA417-19 ¶¶ 3, 5-7, 9-10.

- The charging of another $30.9 million to TNG for ***the very same equipment***;[5] and

- TNG's payment of an approximately $44 million "management fee" to Perkwood that the Stati Parties later conceded was not a validly incurred construction expense.[6]

In these sham transactions, the Stati Parties made it appear they had invested huge sums into the LPG Plant.

The Stati Parties repeated the fraud in their financial statements, both by including the overstated construction costs and by hiding that Perkwood was a related party. *See* JA430 ¶ 42 ("TNG's audited accounts for the years 2007-2009 do not disclose the fact that Perkwood was a related party."). Accounting regulations typically require heightened scrutiny for related-party transactions, precisely in order to prevent this type of fraud.[7]

The Stati Parties then used their falsified statements to generate the inflated bid for the LPG Plant that they subsequently relied upon in the arbitration to dupe

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5 JA418 ¶ 10(2).

6 JA397-98 ¶¶ 60-62.

7 *See, e.g.*, Elaine Henry, et al., *The Role of Related Party Transaction in Fraudulent Financial Reporting*, 4 J. Forensic & Inv. Accounting 186, 187 (2012) ("Many high profile accounting frauds in recent years … have involved related party transactions in some way, creating concern among regulators and other market participants about the appropriate monitoring and auditing of these transactions.").

the Panel into awarding them $199 million. In 2008, the Stati Parties retained Renaissance Capital, an investment bank, to assist them in selling a tranche of assets that included the LPG Plant. JA434-40. Renaissance sent prospective buyers an "Information Memorandum" that included key information regarding the assets. *Id.* The Memorandum said on its face that the financial information it contained—which included a list of investments in the LPG Plant—came straight from the financial statements of Stati companies, including TNG. JA438. The Memorandum also pledged that those statements could be relied upon because they were audited or reviewed by reputable auditors applying International Financial Reporting Standards. JA439.

KMG, the bidder whose valuation was the sole basis for the Panel's damages award for the LPG Plant, made its $199 million bid on September 25, 2008, in express reliance upon the falsified information the Information Memorandum contained. *See* JA444 ("In formulating our Indicative Offer, we have relied upon the information contained in the Information Memorandum and certain other publicly available information.").

The Stati Parties then relied upon their fraud during the arbitration by claiming that the LPG Plant should be valued by reference to the fraudulently obtained KMG Bid. JA388 n.16. As noted above, the Panel left no doubt that it was ***this*** piece of evidence—the amount of the KMG Bid—that formed the entire

basis of its decision to award the Stati Parties $199 million in compensation for the LPG Plant. JA81-82 ¶¶ 1746-48.

2. The English High Court Finds That The Documents Set Forth A Prima Facie Case Of Fraud.

Litigation regarding the award's validity has proceeded in other countries, including Sweden and England. After the documents exposing the fraud came to light, Kazakhstan submitted them to Swedish courts, asserting that they showed that confirmation would violate Sweden's public policy. The Swedish court disagreed, finding that even if accepted as true, the alleged fraudulent procurement of the arbitral award would not violate Swedish public policy. JA477-708; JA751. Thus, the Swedish courts declined to make factual findings as to the extent or materiality of the fraud. JA477-708; JA751; JA737-40.

The English courts took a different view. After Kazakhstan discovered the Stati Parties' fraud, the High Court of Justice (the "English High Court") permitted Kazakhstan to submit evidence to support its contention that enforcement of the Award would contravene English public policy. Kazakhstan submitted more than 2,200 pages of documents and testimony evidencing the fraud. In February 2017, the court held a two-day hearing in which it carefully considered Kazakhstan's contention that the Award was the product of the Stati Parties' fraud.

Four months later, the court ruled in Kazakhstan's favor, finding that Kazakhstan had presented a prima facie case that the Stati Parties obtained the Award by fraud. JA732 ¶ 37. The facts on which it relied included:

- that the Stati Parties conceded in the Swedish proceeding that Perkwood was a Stati-related company, despite having taken a contrary position in the arbitration (JA731 ¶ 26);
- that related-party transactions between Perkwood and TNG artificially inflated the LPG Plant's costs (JA731-32 ¶¶ 27-28, 30-32);
- that the Stati Parties had likely violated their discovery obligations in the arbitration by failing to disclose the agreement with Perkwood (JA731 ¶ 29);
- that the Stati Parties had concealed the true construction costs of the LPG Plant from their auditors, KMG, Kazakhstan, and—most critically—the SCC Panel (JA732 ¶ 34);
- that the KMG Bid states on its face that its estimated value of the LPG Plant is based on information contained in the Information Memorandum, which was in turn "expressly based" on KPM and TNG's financial statements (JA733-34 ¶¶ 40, 42); and
- that, at the express invitation of the Stati Parties and their experts, the Panel relied ***exclusively*** on the KMG Bid in valuing the LPG Plant (JA735 ¶ 45-47).

Based on the foregoing, the English High Court determined that "there [was] the necessary strength of [a] prima facie case" that when the Stati Parties "ask[ed] the Tribunal to rely on the KMG Bid," they committed "a fraud on the [Panel]." JA735 ¶ 48. Thus, it concluded, the fraud allegations needed be "examined at a

trial and decided on their merits" before a decision on confirmation could be made. JA744 ¶¶ 92-93.

Thereafter, the English High Court set a trial date of October 31, 2018 for the fraud case. On February 28, 2018, just several days before a deadline for document disclosure, the Stati Parties unexpectedly filed a notice seeking to voluntarily "discontinue" their enforcement case, purportedly due to a lack of resources to prosecute it. *See Stati & Ors v. The Republic of Kazakhstan*, [2018] EWHC (Comm) 1130, [2018] 1 WLR 3225 (Eng.), ¶ 60-67.[8] That did not sit well with the English High Court. Finding that the Stati Parties' stated rationale was not "credibl[e]" in light of the notice's timing, the court concluded that "the real reason for the notice of discontinuance is that the Statis do not wish to take the risk that the trial may lead to findings against them and in favour of [Kazakhstan]." *Id.* ¶ 24-25. It therefore denied the Stati Parties request, observing that although its ruling might be "exceptional," the evidence of the Stati Parties' fraud on the Panel made "this ... an exceptional case." *Id.* ¶ 60.[9]

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8 The English High Court's opinion is available on Westlaw at 2018 WL 02163653 (select "Official Transcript").

9 An appeal of the English High Court's order is scheduled to be heard on July 31, 2018.

E. The District Court Denies Kazakhstan The Opportunity To Even Present A Fraud Defense.

In the district court, too, briefing on Kazakhstan's initial defenses to confirmation was completed before Kazakhstan learned of the fraud. Accordingly, on April 5, 2016, Kazakhstan filed a motion for leave to add new defenses that arose from the Stati Parties' fraud, including that confirmation of a fraudulently-obtained award would violate the public policy of the United States. JA332-39; *see* New York Convention, art. V(2)(b). Kazakhstan told the court that while it "ha[d] not completely unraveled the totality of Petitioners'" wrongdoing, it "presently underst[ood]" that the Stati Parties had "misrepresented the LPG Plant construction costs for which they claimed reimbursement in the SCC Arbitration." JA335-37. Kazakhstan stated that "[t]he $199 million awarded to Petitioners for the LPG Plant in the SCC Arbitration was a direct result of the fraud," and explained that the "supplemental filing" it wished to submit would set forth "[t]he full details" of the Stati Parties' scheme and its effect on the Award. JA337-38.

The Stati Parties opposed the motion, arguing (among other things) that Kazakhstan's proposed pleading would be "futile" because the Panel based its $199 million award for the LPG Plant on the KMG Bid, which the Stati Parties asserted was neutral and independent. JA358-63. In reply, Kazakhstan emphasized that this was an improper attempt to dispute the alleged facts and that, in any event, the fraud went directly to the KMG Bid: "As will be shown in detail

by Kazakhstan in its proposed supplemental filing, the Stati Parties' fraud ***infected the $199 million number relied upon by the Tribunal***." JA370 (emphasis added); *see also* JA370-71 ("Kazakhstan's supplemental filing will show that the Stati Parties submitted false testimony and evidence to the SCC arbitration tribunal, that this fraud ***directly resulted in the $199 million award*** to the Stati Parties for the LPG Plant and that this $199 million is a material component of the SCC award.") (emphasis added).

Nevertheless, six days after Kazakhstan filed its reply, the district court denied the motion for leave. JA376-79. Without even permitting Kazakhstan to present its proof, the court summarily held that any supplemental filing regarding fraud would be "futile" under the standard of Fed. R. Civ. P. 15, because "it is clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision." JA378.

Kazakhstan moved for reconsideration one week later, on May 18, 2016. JA380-93. It submitted nearly 200 pages of evidence supporting the assertions in its original motion papers by showing the connection between the Stati Parties' fraud and the KMG Bid and demonstrating that the Stati Parties had committed fraud on the Panel by urging it to rely on the KMG Bid. *See, e.g.*, JA388 n.16. Having thereby demonstrated that the court had erred in concluding that

amendment would have been futile, Kazakhstan requested that the district court reconsider its ruling.

On August 5, 2016, without having ruled on the fully briefed motion to reconsider, the district court *sua sponte* stayed the case pending resolution of the proceedings in Sweden. JA455-76. The stay lasted more than a year, until November 6, 2017. Then, on March 23, 2018, the district court issued its final opinion and order denying the motion for reconsideration and confirming the Award. JA752-84. As to the motion, the district court acknowledged that both in its initial motion and on reconsideration, Kazakhstan had asserted that the Stati Parties "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement." JA764-65. Nevertheless, the court denied the reconsideration motion, stating that it relied on an "entirely separate theory of fraud that [Kazakhstan] did not seek leave to introduce" in its original filing. JA765. Specifically, the court believed that Kazakhstan's original motion had focused only on "false sworn testimony and expert reports," while its reconsideration motion had argued that "the [KMG Bid] was itself the product of fraud." JA764-65.

The court also rejected Kazakhstan's other defenses on the merits. It concluded that Kazakhstan waived its right to appoint an arbitrator because the notices the SCC sent, when read in conjunction with Articles 5, 12, and 13 of the

SCC's Rules, "plainly informed" Kazakhstan that its Answer should identify its arbitrator. JA778-81. As to the Stati Parties' failure to comply with the settlement period requirement, the court held that this requirement was procedural, rather than jurisdictional, and therefore within the arbitrators' power to adjudicate. JA772-75; JA460-63. On the basis of that conclusion, it deferred without analysis to the arbitrators and confirmed the Award. *Id.*

This appeal followed.

SUMMARY OF ARGUMENT

The judgment below, like the award it confirmed, suffers from three fatal flaws. First, the district court erred in holding that the SCC did not violate its own rules, the parties' alleged agreement, or the requirements of due process when it stripped Kazakhstan of its right to appoint an arbitrator. The SCC's communications with Kazakhstan, as well as its own rules, reveal that Kazakhstan was never on notice that the time to appoint its arbitrator had come—much less that a mandatory deadline had been imposed. Because the right to appoint an arbitrator goes to the very heart of a proceeding's fairness, the SCC's decision to strip Kazakhstan of its right without notice rendered the Award unconfirmable.

Second, the Award should not have been confirmed because Kazakhstan never agreed to arbitrate this dispute. When Kazakhstan entered into the ECT, it consented to arbitrate only if certain critical conditions were met. One such

condition was that investors like the Stati Parties would not submit to arbitrate—or otherwise resolve under the terms of the treaty—any dispute that was not first the subject of a request for amicable settlement, followed by a three-month cooling-off period. Because this obligation was a condition of Kazakhstan's consent to arbitrate, the district court should have reviewed *de novo* whether the Stati Parties' complied with it. Moreover, even under a deferential standard of review, the Panel's determination cannot stand, because the settlement period is mandatory and the Stati Parties undeniably failed to observe it.

Finally, the district court erred when it denied Kazakhstan its right under the New York Convention and FAA to present proof of all its defenses—specifically, the newly-discovered defense that the Award was procured by the Stati Parties' fraud. Instead, the court summarily found that Kazakhstan's proffered defense would be futile. This error was clear on the original motion papers but became all the more clear on Kazakhstan's motion for reconsideration, when Kazakhstan—twenty-two months before the district court ruled on the Petition—brought forth a further preview of its extensive evidence that the fraud infected the precise metric the Panel relied on in calculating the LPG Plant's value.

STANDARD OF REVIEW

Where a party opposing a petition to confirm proves one of the "seven exclusive grounds upon which courts may refuse to recognize" an international

arbitration award under the New York Convention, the arbitral award cannot be confirmed. *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 89-90 (2d Cir. 2005); *see generally* 9 U.S.C. § 207. Except as noted below, the district court's ruling turned exclusively on questions of law. Review is therefore *de novo*. *Encyclopaedia Universalis*, 403 F.3d at 89-90.

ARGUMENT

I. THE AWARD SHOULD NOT HAVE BEEN CONFIRMED BECAUSE THE SCC UNJUSTIFIABLY STRIPPED KAZAKHSTAN OF ITS RIGHT TO APPOINT AN ARBITRATOR.

A. The Award Is Unenforceable Under Article V(1)(d) Of The New York Convention Because The Composition Of The Arbitral Panel Violated The Parties' Alleged Agreement.

A federal court cannot enforce an award if it "finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207. The Convention, in turn, provides that a court must refuse recognition and enforcement of an award if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, art. V(1)(d); *Encyclopaedia Universalis*, 403 F.3d at 89-90. Although public policy favors international arbitration, courts cannot "overlook agreed-upon arbitral procedures in deference to that policy." *Encyclopaedia Universalis*, 403 F.3d at 91. Rather, "the federal policy is simply to ensure the enforceability" of such agreements "***according to***

their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (emphasis added). Thus, in *Encyclopaedia Universalis*, the Second Circuit, applying the requisite *de novo* review, *see* 403 F.3d at 89-90, refused to confirm an award where the tribunal contravened the requirements the "parties explicitly settled on" for "how arbitrators are selected." *Id.* at 91. The "New York Convention," it held, "requires that" such "commitment[s] be respected." *Id.* (noting that "Article V(1)(d)" indicates "the importance of arbitral composition" by singling out arbitral selection as "one of only seven grounds for refusing to enforce an arbitral award").

There is no dispute that "the SCC Rules ... governed the arbitration." JA296, 303. That is because, if any agreement to arbitrate existed between Kazakhstan and the Stati Parties, it was formed only under the terms of the ECT. *See Chevron Corp. v. Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015) (investment treaty's arbitration provision is a "standing offer to ... investors to arbitrate" that is "accepted in the manner required by the treaty"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (in selecting arbitration, party "trades the procedures and opportunity for review of the courtroom" for the applicable arbitral rules). The ECT, in turn, provides that the SCC is one of three possible arbitral fora and states that whatever tribunal is chosen must "decide the issues in dispute in accordance with ... applicable rules …." ECT, art. 26(6).

The SCC Rules are clear, however, that where an arbitral tribunal "is to consist of more than one arbitrator, ***each party shall appoint an equal number of arbitrators*** and the Chairperson shall be selected ***by the Board***." SCC Rule 13(3) (emphasis added). That did not happen here: the SCC simply appointed Kazakhstan's arbitrator on its behalf. JA296 (Stati Parties' admission that "the SCC appointed a co-arbitrator on behalf of" Kazakhstan). That was a clear violation of the governing arbitration rules, and it renders the resulting award unconfirmable under Article V(1)(d) of the New York Convention.

In usurping Kazakhstan's right to name an arbitrator, the SCC purported to rely on its Rule 13(3), which provides that "[w]here a party fails to appoint arbitrator(s) ***within the stipulated time period***, the [SCC's] Board" may "make the appointment." SCC Rule 13(3) (emphasis added).[10] But that provision was plainly inapplicable. Neither the Stati Parties nor the SCC has ever even claimed that the parties "stipulated" to a time period in which arbitrators would be named. Absent such agreement, the Rules permitted the Board to name an arbitrator on a party's behalf only if the party failed to act "within the time period ***set by the Board***." SCC Rule 13(1) (emphasis added). But ***the Board*** never set a time

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[10] As noted below, *infra* at 32-33, the SCC's conclusion was in stark contrast to its ruling in a previous proceeding. There, the SCC told Kazakhstan that "[t]he SCC Rules empower the SCC Institute to make an appointment" of an arbitrator only where a party "explicitly fails to make an appointment." JA287-88.

period, either. Of the three communications the SCC sent to Kazakhstan before usurping its appointment power, none mentioned that the window for appointing an arbitrator had even begun—much less that it was about to end without notice. *See supra* at 5-9. Indeed, the first letter reveals that the SCC had not even settled on ***how*** arbitrators would be chosen by the time the district court said Kazakhstan should have named its arbitrator. JA235 (requesting Kazakhstan's "comment" on Stati Parties' proposal for choosing arbitrators). Rule 13(3) therefore cannot justify the SCC's violation of Kazakhstan's right to choose its arbitrator.

The district court, largely eschewing the SCC's stated rationale, concluded that even though the SCC never told Kazakhstan to name an arbitrator, Kazakhstan should have known that the time had come to do so. Specifically, the district court held that the SCC's notices—when read in tandem with a combination of other provisions, including SCC Rules 5, 12, and 13—"plainly informed [Kazakhstan] of the date by which" it should name an arbitrator. JA778-80.

That conclusion was wrong, and the district court reached it only by misreading the SCC's unambiguous rules. The district court relied chiefly on Rules 5(1) and 5(3), but neither of those provisions could have given Kazakhstan the necessary notice. Rule 5(1) sets forth the required components of a respondent's Answer. The only conceivably relevant portions of that rule are Rules 5(1)(iv) and (v), which provide that the Answer should contain "comments

on the number of arbitrators and the seat of arbitration," and "***if applicable***, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Respondent." SCC Rules 5(1)(iv), (v) (emphasis added). Rule 5(3) also provides that "[f]ailure by the Respondent to submit an Answer shall not prevent the arbitration from proceeding." SCC Rule 5(3).

Nothing in those provisions created a deadline for appointing an arbitrator. First, Rule 5(1)(v) makes clear that the requirement that a party identify its appointed arbitrator must come not from the Rule itself—which governs only "if applicable"—but from some ***other*** communication that makes the Rule "applicable," presumably by telling a party to name an arbitrator in its Answer or another document. This is further confirmed by Rule 5(1)(iv), which (much like the SCC's initial letter to Kazakhstan) provides that an Answer should include "comments on the number of arbitrators and the seat of arbitration." Given that even the number of arbitrators might be unresolved when an Answer is filed, Rule 5(1)(v) cannot be read to automatically require that a respondent appoint its arbitrator in that same filing. And because Rule 5(1)(v) did not require Kazakhstan to name an arbitrator in its Answer, Rule 5(3)'s warning about the consequences of failure to submit an Answer had no application to that issue.

Nor do Rules 12 and 13 alter the analysis. Rule 12 concerns only the number of arbitrators on a panel. And, as already explained, *supra* at 26-27, Rule

13 provides what Rule 5 conspicuously does not: a standard permitting the SCC to appoint an arbitrator ***if a party fails to do so by the relevant deadline***. Once again, however, the deadline itself must come from elsewhere, such as agreement among the parties or, if no such agreement is reached, a determination of the SCC.

No such deadline was ever set or disclosed to Kazakhstan. Nor did the SCC's three communications give Kazakhstan any notice of such a deadline. To the contrary, the SCC's first communication included specific instructions as to what that Answer ***must*** include, and ***did not*** say to appoint an arbitrator. JA235. Instead, the SCC asked Kazakhstan to "comment" on the issue that needed to be resolved before appointment of the panel could properly take place—the Stati Parties' proposal as to how the arbitral panel should be named. *Id.* The SCC's second communication was only a reminder to submit the previously-defined Answer. JA242. And the third, which Kazakhstan did not receive until the very day the SCC appointed Lebedev, contained only ***the Stati Parties' request*** that the SCC usurp Kazakhstan's appointment power, along with a short cover letter that lacked any indication that the SCC intended to do so. JA244-45. None of these communications even hinted that the SCC had set a time period within which Kazakhstan was to appoint an arbitrator or forever forfeit that right.

Accordingly, because the SCC, without providing any justification or prior notice, stripped Kazakhstan of its right to appoint an arbitrator, the award violates

Article V(1)(d) of the New York Convention and should not have been confirmed. *See Encyclopaedia Universalis*, 403 F.3d at 89-90.

B. The Award Is Unenforceable Under Article V(1)(b) Of The New York Convention Because Kazakhstan Was Stripped Of Its Appointment Right Without Due Process.

The SCC's decision to name an arbitrator in Kazakhstan's stead also rendered the award unconfirmable under Article V(1)(b) of the New York Convention, which provides that a court must decline recognition where "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case." New York Convention, art. V(1)(b). That provision "essentially [imports] the forum state's standard of due process," and confirms "that due process rights are entitled to full force under the Convention as defenses to enforcement." *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

The "essential elements of due process" are "notice" that the deprivation of a right is at stake "and [an] opportunity to defend" against it. *Simon v. Craft*, 182 U.S. 427, 436 (1901). To satisfy those requirements, notice must be given "at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an

opportunity to present their objections," *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See Application of Gault*, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance ... so that reasonable opportunity to prepare will be afforded."). The more important the private interest at stake, the more substantial the notice must be. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

The right at stake here—Kazakhstan's ability to appoint an arbitrator pursuant to Rule 13(3)—was critical to the fairness of the SCC proceeding. "The arbitrator is ***the decisive element*** in any arbitration." Martin Domke et al., 2 *Domke On Commercial Arbitration* § 24:1 (2018) (emphasis added). Indeed, one commentator has observed that "[t]he selection of arbitrators is as critical to an arbitration as the selection of jurors is to a jury trial." Robert F. Cushman et al., *Construction Disputes: Representing The Contractor* § 14.02 (3d ed. 2001). That is because the very "base of the arbitration process" is the arbitrator's "ability, expertness, and fairness." Domke, *supra*, § 24:1.

The method of selecting arbitrators is also of paramount importance. *See, e.g.*, *Encyclopaedia Universalis*, 403 F.3d at 91. In "international practice," it is widely recognized that "the right to choose one member of the panel is the very essence of arbitration." Alan Scott Rau, *Integrity in Private Judging*, 38 S. Tex. L. Rev. 485, 506 (1997); *see also Stef Shipping Corp. v. Norris Grain Co.*, 209 F.

Supp. 249, 253 (S.D.N.Y. 1962) ("The right to appoint one's own arbitrator ... is ... the essence of tripartite arbitration.") (internal quotation marks omitted). That right acts as the "chief guarantor" of a panel's "fairness and competence." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 208-09 (D. Mass. 1998). Parties share a "basic recognition" that each other's "appointed arbitrators" will not be entirely "neutral," and therefore, "both parties must have an equal right to participate in the appointment process." *Id.*

The SCC once shared that recognition—and told Kazakhstan so. Four years earlier, in another arbitration to which Kazakhstan was a party, the SCC rejected a different investor's effort to have an arbitrator named on Kazakhstan's behalf. As the SCC explained then, "[e]ach party to an arbitral proceeding shall be afforded a right to appoint an arbitrator," and that right "is a fundamental prerequisite of any international arbitration." JA287-88. As the SCC further stated:

> The SCC Rules empower the SCC Institute to make an appointment ***only where a party explicitly fails to make an appointment***. The exercise of this power in excess, i.e., for the SCC Institute to appoint an arbitrator itself, could jeopardise the proceedings and may constitute a ground for a future challenge of the award.

Id. (emphasis added). As the SCC noted, "***this is a universally accepted principle***." *Id*. (emphasis added).

Yet in this case, the SCC deprived Kazakhstan of its right to appoint an arbitrator without providing any notice, in violation of both its own rules and its

prior representations to Kazakhstan. *See supra* at 26-30. As a result, the Stati Parties were allowed to select their arbitrator but Kazakhstan was not. In light of the importance of that right, the SCC's action violated due process and, therefore, Article V(1)(b) of the New York Convention. *See, e.g.*, *Iran Aircraft*, 980 F.2d at 142-46. The district court erred in concluding otherwise.

Nor was the court correct in suggesting that the SCC's after-the-fact review of Lebedev's appointment provided Kazakhstan the "opportunity to be heard" that due process requires. JA780. The notice that Kazakhstan was denied was ***prior*** notice that its right to appoint an arbitrator would be arbitrarily and permanently taken away if it did not act by a certain time. This deprivation could not have been cured merely by giving Kazakhstan an opportunity to argue to the SCC that the decision it already made was erroneous. *See Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("[W]hatever its form, opportunity for [a] hearing must be provided before the deprivation at issue takes effect."). But the SCC did not give Kazakhstan even that opportunity. Instead, the SCC misconstrued Kazakhstan's objection as a challenge to Lebedev's "impartiality," "independence," and "qualifications" under SCC Rule 15(1), and therefore refused to consider whether its usurpation of Kazakhstan's right to appoint its own arbitrator was improper. *See* JA260-64. That this took place before even the first scheduling conference in the arbitration,

when the SCC easily could have cured its error, makes its actions even less justifiable.

Because the Panel was selected in a manner that violated both the parties' agreement and the basic requirements of due process, the award violates Article V(1)(b) of the New York Convention and should not have been confirmed.

II. THE AWARD SHOULD NOT HAVE BEEN CONFIRMED BECAUSE KAZAKHSTAN NEVER AGREED TO ARBITRATE DISPUTES THAT VIOLATED THE ECT'S SETTLEMENT PERIOD REQUIREMENT.

The district court also erred in confirming the award because the Stati Parties failed to comply with the mandatory notice of dispute and three-month settlement period that was an express condition of Kazakhstan's agreement to arbitrate. It is beyond peradventure that the Stati Parties violated that requirement. They instituted the SCC arbitration only five days after the contracts at issue were canceled, and without any prior notice to Kazakhstan.

Although the district court agreed "that the contractual requirement to attempt to come to a negotiated resolution is mandatory," it nevertheless concluded that the settlement period requirement "does not serve as a condition precedent" to Kazakhstan's consent to arbitrate. JA462, 773. Thus, under the court's interpretation of *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), it believed that "such procedural prerequisites are for the tribunal, not the Court, to interpret and apply." JA468, 773. The court therefore simply rubber-stamped the

Panel's determination that the Stati Parties did not need to comply with the mandatory settlement period, without conducting any meaningful review of that decision. *See* JA773-74.

That was error. The mandatory settlement period was an express condition of Kazakhstan's consent to arbitration, and the failure to comply with it therefore deprived the SCC of jurisdiction over this dispute. As such, under *BG Group*, the question whether the precondition was satisfied—the answer to which is clearly "no"—was for the district court, not the arbitrators, to resolve. The district court therefore should have engaged in *de novo* review. But even under deferential review—which the district court failed to undertake—the Panel's decision cannot be sustained.

A. The Arbitrators Lacked Jurisdiction To Issue The Award.

"[A]rbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Comm's Workers of Am.*, 475 U.S. 643, 648 (1986); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration ... is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."). For that reason, "arbitration of a particular dispute" is valid "only where ***the court*** is satisfied that the parties agreed to arbitrate ***that dispute***." *Granite Rock Co. v. Int'l B'hood of Teamsters*, 561 U.S.

287, 297 (2010) (emphases added). In recognition of that principle, the New York Convention provides that an arbitral award may be confirmed only if it is made pursuant to a valid agreement to arbitrate. *See* New York Convention, art. V(1)(a); *see also id.*, art. V(1)(c) (confirmation may be denied where award falls outside "scope of the submission to arbitration").

Whether "a particular dispute" falls within the parties' agreement to arbitrate is generally a question for judicial, rather than arbitral, resolution. *Granite Rock*, 561 U.S. at 298. Therefore, "'whether or not [an entity] was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by ***the Court*** on the basis of the contract entered into by the parties.'" *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (emphasis added; citation omitted). "[T]he court must resolve any issue that calls into question the ... applicability of the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock*, 561 U.S. at 297.

In *BG Group*, the Supreme Court analyzed a treaty providing for arbitration if local courts failed to reach a final decision within eighteen months after the aggrieved party brought suit. 134 S. Ct. at 1203. The treaty, however, did not indicate that the local-litigation requirement was jurisdictional, a question of arbitrability, or a condition of the foreign sovereign's consent to arbitrate. *Id.* at 1209. The Court therefore held that whether the provision was violated was a

question for the arbitrators, not the Court, to decide in the first instance, subject to deferential judicial review. *Id.* at 1212.

The Court, however, reaffirmed the principle that "courts presume that the parties intend courts, not arbitrators, to decide … disputes about 'arbitrability,'" which involve questions whether parties have agreed to arbitrate or to arbitrate a particular dispute. *Id*. at 1206. It therefore embraced the settled rule that "'[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'" *Id*. at 1207 (quoting *AT&T*, 475 U.S. at 649). But the Court held there is a "presumption" that arbitrators will, in the first instance, settle other disputes about the meaning and application of non-jurisdictional, procedural provisions that "determine[] ***when*** the contractual duty to arbitrate arises, not ***whether*** there is a contractual duty to arbitrate at all." *BG Grp.*, 134 S. Ct. at 1207 (emphasis in original).

In this case, there was no contractual duty to arbitrate at all. The ECT, unlike the treaty considered in *BG Group*, expressly states that the settlement period requirement is a condition of Kazakhstan's consent to arbitrate. Thus, Kazakhstan never consented to submit the Stati dispute—or any other dispute in which a three-month settlement period was not observed—to arbitration.

Accordingly, whether the provision was violated is a question for this Court, not the arbitrators, to consider *de novo*.

The ECT places strict limitations on what conflicts may be resolved under its dispute-resolution methods. Article 26(1) provides that disputes between an investor and a signatory nation concerning an alleged breach of the nation's obligations under the treaty "shall, if possible, be settled amicably." ECT, art. 26(1). Article 26(2)(c) then provides: "***If*** such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute ***may*** choose to submit it for resolution … in accordance with the following paragraphs of this Article." ECT, art. 26(2)(2) (emphasis added). Finally, Article 26(3) provides that "[s]ubject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation ***in accordance with the provisions of this article***." ECT, art. 26(3) (emphasis added).

Under paragraphs (1) and (2) of Article 26, there are three requirements that ***must*** be met before the ECT's dispute-resolution provisions are even triggered. *First*, the "dispute[]" must be "between a [signatory nation] and an Investor of another [signatory nation]." ECT, art. 26(1). *Second*, the "dispute[]" must involve "an alleged breach of an obligation" of the signatory nation. *Id*. *Third*, the

"dispute[]" must have been submitted for "amicable settlement," and "a period of three months" from that date of submission must have passed. ECT, art. 26(2). It is only "***[i]f*** such [a] dispute[]" meets those conditions that an "Investor party to a dispute ***may*** choose to submit it for resolution ... in accordance with the following paragraphs of [Article 26]." *Id*. (emphasis added).

Article 26(2) thus expressly limits Kazakhstan's consent to resolve disputes "in accordance with the following paragraphs of [Article 26]." *Id*. And, unlike the treaty at issue in *BG Group*, it does so by employing the archetypal example of conditionality: a simple, "if-then" statement that makes Kazakhstan's consent applicable ***only*** "[i]f [a] dispute[] can not be settled" within three months ***after*** amicable resolution of that dispute was requested. ECT, art. 26(2). Because the treaty explicitly conditions Kazakhstan's consent on observance of the mandatory settlement period, the "presumption" that *BG Group* applied does not apply.

Here, rather than request amicable settlement, the Stati Parties filed their Request for Arbitration ***five days*** after the termination of the contracts at issue in the arbitration, and without ever notifying Kazakhstan that they planned to do so. Because Kazakhstan never consented to arbitrate such disputes that violated Article 26's conditions, there was no valid agreement to arbitrate this dispute. The arbitrators therefore lacked jurisdiction, and the district court should have declined to enforce the award. *See* New York Convention, art. V(1)(a), (c); *cf. Chevron*,

795 F.3d at 206 (treaty's arbitration provision characterized as a "standing offer to ... investors to arbitrate ... disputes" that must be "accepted in the manner required by the treaty").

The district court's contrary application of *BG Group* is incorrect as a matter of law.[11] The court concluded that because Article 26(3)(a), if read alone, appears to be "[s]ubject only to" two exceptions,[12] enforcing the settlement period requirement "would be an obscure way to include a third major exception to this otherwise unconditional consent." JA463. But the terms of a treaty—like those of a contract or a statute—cannot be read in isolation.[13] When read in conjunction with the provisions immediately preceding it, Article 26(3)(a) cannot be

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[11] The district court also incorrectly suggested that this Court's decision in *Chevron*, 795 F.3d at 205, supported its holding. JA466-68. In *Chevron*, because the arbitration agreement specified that certain United Nations rules would govern the arbitration, the Court held that the party challenging confirmation had expressly consented to have issues of arbitrability decided by the tribunal. *Id.* at 207-08. Here, by contrast, to the extent any agreement to arbitrate existed, it was governed by the SCC's rules, which do not confer such authority.

[12] The two exceptions, which are not directly pertinent here, relate to disputes previously submitted for resolution and disputes arising under specific agreements between the parties. *See* ECT, art. 26(3)(b); *see also id.*, art. 10(1).

[13] *See BG Grp.*, 134 S. Ct. at 1208 ("As a general matter, a treaty is a contract, though between nations."); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (court's "duty" is to construe document as a whole, rather than its "isolated provisions"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (a "cardinal principle of contract construction" is that "a document should be read to give effect to all its provisions and to render them consistent with each other").

understood to grant consent to arbitrate disputes that fail to satisfy those paragraphs. That is because, as Article 26(2) makes clear, the ***only disputes*** that may be "submit[ted] for resolution ... in accordance with" Article 26(3)(a) are those that satisfy the requirements of Article 26(1) and (2).

The district court's contrary reasoning proves too much, and would render the treaty an unprecedented sacrifice of sovereign prerogatives. For example, Article 26(1) states that the ECT applies only to "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." ECT, art. 26(1). Plainly, Kazakhstan never gave its consent to arbitrate ***every*** dispute, regarding ***any*** subject matter, with ***anyone***. But under the district court's flawed reasoning, Kazakhstan and all other signatories did just that, because neither the required identity of the counterparty nor the required subject matter of the action appears in the two exceptions set forth in Article 26(3).

Moreover, Article 26(4), which lists the permissible arbitral fora, sets forth certain requirements that apply "[i]n the event that an Investor chooses to submit the dispute for resolution ***under subparagraph (2)(c)***." ECT, art. 26(4) (emphasis added). That provision confirms that ***any*** dispute submitted for resolution under

Article 26 is so submitted under the requirements of Article 26(2)(c)—and therefore must satisfy Article 26(2).[14]

Accordingly, because compliance with the settlement period is a mandatory condition of Kazakhstan's consent to arbitrate, the district court should have reviewed *de novo* whether it was satisfied here. And because the provision was plainly violated, the award should not have been confirmed.

B. The Panel's Determination That The Settlement Period Was Satisfied Was Erroneous Under Any Standard Of Review.

In any event, setting aside whether *de novo* review was required, the district court erred in confirming the award because the Panel's decision to excuse the Stati Parties' violation cannot withstand even deferential review. As the Supreme Court said in *BG Group*, even where procedural provisions are for the arbitrator to decide in the first instance, a sovereign "is nonetheless entitled to court review of the arbitrator['s] decision." *BG Grp.*, 134 S. Ct. at 1212. Under that deferential review, an award cannot be confirmed if the arbitrators "stra[y] from interpretation and application of the agreement or otherwise effectively dispens[e] their own brand of … justice." *BG Grp.*, 134 S. Ct. at 1213 (quoting *Stolt-Nielsen S. A. v.*

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[14] This should come as no surprise to the Stati Parties, who—as the Petition to Confirm reveals—asserted that their Request for Arbitration was submitted "in accordance with Article 26(4)(c) of the ECT." JA18-19 ¶ 20.

AnimalFeeds Int'l Corp., 559 U. S. 662, 671 (2010)) (internal quotation marks omitted)).

Here, the district court did not even review the Panel's decision. In its final order confirming the Petition, the district court simply incorporated by reference its earlier analysis in an interlocutory decision regarding subject matter jurisdiction. *See* JA773, 781. But that jurisdictional ruling is devoid of any review of the Panel's analysis; instead, after concluding that the settlement-period requirement was non-jurisdictional, the district court simply noted that the decision had been made and found that to be enough. *See* JA468 ("Because the arbitrators found the procedural hurdle to arbitration to have been satisfied, [Kazakhstan] has failed to rebut the presumption of an agreement to arbitrate under the FSIA."). Thus, although the court said it had "deferred" to the Panel's conclusion that the settlement period requirement had been satisfied, JA773, in reality the court simply rubber-stamped that conclusion. Because deferential review does not mean no review at all, the district court erred in failing to engage even in a deferential review of the Panel's analysis.

Nor could the Panel's conclusion have withstood such review. The Stati Parties blatantly violated the settlement period requirement by initiating the arbitration only five days after Kazakhstan terminated the contracts at issue in the arbitration. JA32 ¶ 6. Yet the Panel concluded that its three-month, mid-

arbitration stay eliminated the prejudice that resulted from the Stati Parties' failure to observe the settlement period, and that the requirement therefore did not have to be enforced. JA61-62 ¶¶ 828-30. To the extent the district court engaged in any review of the Panel's determination, it was to this conclusion that it deferred. JA774 n.10 ("Because [Kazakhstan] proposed and obtained a means to cure the alleged procedural deficiency, its claim that the initial failure to wait still invalidates the arbitration is not persuasive.").

But the Panel's conclusion does not even draw its essence from the parties' alleged agreement. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 671-77 (arbitrator's first "task" is "to interpret and enforce a contract"). Arbitration agreements, like other contracts, must be "enforce[d] ... according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Therefore, where parties "explicitly settl[e] on" rules for arbitration, the "New York Convention requires that their commitment be respected." *Encyclopaedia Universalis*, 403 F.3d at 91-92. The Panel's harmless-error determination was a straightforward violation of that rule. Having found that the Stati Parties initiated the arbitration in breach of the ECT, the Panel should have simply declined to proceed with the arbitration. *See, e.g.*, *Volt*, 489 U.S. at 476. In doing otherwise, the Panel "stray[ed] from interpretation and application of the agreement and effectively dispense[d] [its] own brand of … justice." *Stolt-Nielsen*, 559 U.S. at 671 (internal quotation marks omitted).

Moreover, even if a harmless-error analysis were called for, the record does not support the Panel's conclusion. That is because the Stati Parties' default substantially aggravated an even more egregious unfairness, when the SCC prematurely appointed an arbitrator on Kazakhstan's behalf ***during what should still have been the notice period***. *See supra* at 24-34. Because the SCC declined to permit Kazakhstan the time it needed *ex ante*, the mid-arbitration "hiatus had no remedial effect." *Encyclopaedia Universalis*, 403 F.3d at 91. The Panel's self-aggrandizing decision to deem the default harmless and permit the arbitration to proceed therefore cannot stand under any standard of review.

III. THE DISTRICT COURT ERRED BY DENYING KAZAKHSTAN ITS RIGHT TO PRESENT PROOF THAT THE AWARD WAS PROCURED BY FRAUD.

After the parties had finished briefing Kazakhstan's then-known defenses to the Petition, but long before the district court ruled on it, Kazakhstan discovered evidence that the Stati Parties had obtained the award by fraudulently inflating the valuation of the LPG Plant through sham, related-party transactions, and then inviting the Panel to rely on a bid procured with that fraudulent evidence. The district court, however, denied Kazakhstan leave to present that proof, wrongly concluding this defense would be "futile" because no evidence could substantiate Kazakhstan's allegations of fraud. Then, when Kazakhstan explained why this conclusion was incorrect, and presented further details of the alleged fraud a week

later—still twenty-two months before the district court actually ruled on the Petition—the court nonetheless denied Kazakhstan any opportunity to present its defense.

Both determinations were erroneous. The district court erred in denying Kazakhstan's motion for leave by wrongly concluding that presentation of the additional defense would be futile. And the court abused its discretion by not reconsidering that denial even after Kazakhstan further explained why the original ruling was incorrect, and presented copious evidence that the arbitral award was, in fact, infected by the Stati Parties' fraud. This Court should therefore vacate the judgment below so that Kazakhstan can exercise its right to present its proof of the Stati Parties' fraud and explain why such proof compels denial of the Petition.

A. The District Court Erred In Denying Kazakhstan Leave To Present Newly-Discovered Evidence Of Fraud.

In the district court, the parties agreed that the standard of Fed. R. Civ. P. 15 governed Kazakhstan's Motion for Leave to Submit Additional Grounds in support of its opposition to the Petition. *See, e.g.*, JA377. Although purporting to apply that standard, the district court concluded that supplementation would be futile because "it [was] clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision, so [Kazakhstan's] proposed submissions would not be germane to the petition to confirm the award." JA378. The district court's conclusion was erroneous as a matter of law.

"Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962). That "mandate is to be heeded," *id.*, and a motion to amend should be denied as futile only if the pleading it proposes "would not survive a motion to dismiss," *Jackson v. Teamsters Local Union 922*, 991 F. Supp. 2d 64, 68 (D.D.C. 2013) (emphasis added) (quoting *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004)). Because that analysis turns on a pure question of law, review of a district court's denial on futility grounds is *de novo*. *See, e.g., Xia v. Tillerson*, 865 F.3d 643, 649-50 (D.C. Cir. 2017).

The district court erred in holding that it would be "futile" for Kazakhstan to present proof of the Stati Parties' fraud. Under the New York Convention's "public policy" exception and U.S. law, evidence that an award was procured by fraud renders it unconfirmable. *See 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"); New York Convention, art. V(2)(b) (confirmation may be refused if recognition or enforcement of award would be contrary to forum's "public policy"). Kazakhstan's motion for leave sought leave precisely to raise this defense to

enforcement of the Award, based on evidence of fraud that only came to light after initial briefing was complete on the Petition. JA332-39.

Kazakhstan explained in its motion that while it "ha[d] not completely unraveled the totality of Petitioners'" wrongdoing, it "presently underst[ood]" that the Stati Parties had "submitted false testimony and evidence to the SCC Arbitration tribunal and thus obtained the SCC Award through fraud." JA335, 337. Specifically, Kazakhstan alleged that the Stati Parties "fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement in the SCC arbitration." JA335. Kazakhstan therefore stated that "[t]he $199 million awarded to Petitioners for the LPG Plant in the SCC Arbitration was a direct result of the fraud," and sought leave to present a "supplemental filing" that would set forth "[t]he full details" of the Stati Parties' scheme and its effect on the Award. JA337-38. On reply, Kazakhstan further fleshed out its allegations: "As will be shown in detail by Kazakhstan in its proposed supplemental filing, ***the Stati Parties' fraud infected the $199 million number relied upon by the Tribunal to award compensation to the Stati Parties for the LPG Plant***." JA370 (emphasis added); *see also* JA370-71 ("Kazakhstan's supplemental filing will show that the Stati Parties submitted false testimony and evidence to the SCC arbitration tribunal, that ***this fraud directly resulted in the***

$199 million award to the Stati Parties for the LPG Plant and that this $199 million is a material component of the SCC Award.") (emphasis added).

Despite these allegations, the district court denied Kazakhstan leave even to present the proof supporting its defense. Noting that the Arbitration Panel had disclaimed reliance on expert reports in favor of "contemporaneous bids," the district court—apparently believing that Kazakhstan's assertions of fraud could not possibly pertain to the validity of the KMG Bid the Panel relied on—reasoned that it was "clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision." JA378. Therefore, the court concluded, it would be futile "to conduct a mini-trial on the issue of fraud here when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material." JA378-79. Thus, the court simply adopted assertions in the Stati Parties' briefs that themselves repeated the underlying fraud, *i.e.*, that the $199 million KMG Bid was a fair and neutral basis on which to award damages for the LPG Plant.

Under the "futility" standard the district court applied, the question is whether the "proposed pleading"—not the motion for leave—can possibly set forth a cognizable claim or defense. *Jackson*, 991 F. Supp. 2d at 68; *see also*, *e.g.*, *Henderson v. Stanton*, C.A. No. 97-5358, 1998 WL 886989, at *1-2 (D.C. Cir. Dec. 1, 1998) (district court's futility determination was erroneous where it rested on "speculation" about what proposed pleading might contain). In its motion for

leave and its reply, Kazakhstan simply sought leave to present a supplemental filing that would have demonstrated precisely how the Stati Parties' fraud "infected the $199 million number relied upon by the tribunal to award compensation to the Stati Parties for the LPG Plant." JA370. The district court therefore erred as a matter of law in holding that it would have been futile to allow Kazakhstan to present this proof on the ground that "the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision." JA378. As Kazakhstan informed the court in the plainest possible terms, the defense it sought leave to present ***did*** relate to evidence "relied upon" in the Award.

The district court had no basis for holding that the fraud that Kazakhstan would present in its proposed supplemental filing could only possibly relate to evidence not relied on by the Panel. To the contrary, as shown above and as was found by the English High Court, Kazakhstan's evidence of fraud directly undermined the reliability of the precise evidence on which the Arbitral Panel relied: KMG's $199 million bid. *See supra* at 13-19. As the High Court found, that fraud was material because "there is the clearest argument that the KMG Indicative Bid would have been lower" had it not been for the Stati Parties' fraud. JA734 ¶ 43. That is because the Stati Parties fraudulently inflated the value of that bid and the Panel's award by engaging in sham related-party transactions, concealing that fact from TNG's auditor (who then vouched for the fraudulent

financial reports relied on by KMG), and urging the Panel to rely on the fraudulent bid value. Kazakhstan had the legal right to "furnish … proof" of one of the New York Convention's defenses to confirmation. New York Convention art. V(1). It was legal error for the district court to deny Kazakhstan leave to even present its defense without even seeing that proof.

B. The District Court Abused Its Discretion By Ignoring The Evidence Of Fraud Presented By Kazakhstan.

Even if the district court initially failed to comprehend that the "contemporaneous bids" relied on by the Panel were the exact evidence Kazakhstan would show were poisoned by the Stati Parties' fraud, JA378-79, it abused its discretion by failing to grant reconsideration when informed of its misunderstanding shortly thereafter. Denial of reconsideration is ordinarily reviewed for abuse of discretion. *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 349 (5th Cir. 1988). Nevertheless, an order denying reconsideration of an interlocutory order will be reversed when the district court fails to "consider ... the record as it exists at the time of the motion for reconsideration[,] [and] not just as it existed at the time of the initial ruling." *Id.* Moreover, even as to final orders, reconsideration must be granted "[w]hen a party timely presents a previously undisclosed fact so central to the litigation that it shows the initial judgment to have been manifestly unjust." *Comp. Prof'ls for Soc. Responsibility v. U.S. Secret Service*, 72 F.3d 897, 903 (D.C. Cir. 1996). That is so "even [where] the original

failure to present that information was inexcusable." *Id.*; *see Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (***post-judgment*** reconsideration appropriate where, if "initial judgment had stood," the "losing side in an action for fraud" would have benefited).

In its reconsideration motion, Kazakhstan again made clear that the Stati Parties' fraud went directly to the validity of the $199 valuation of the LPG Plant. *See, e.g.*, JA452. This time, the district court well understood that argument. It recognized that Kazakhstan wished to submit evidence "that the indicative bid the arbitrators did select as a measure of the value [of] the LPG plant—the KMG bid—was itself the product of fraud." JA765 (quotation marks omitted). Nevertheless, relying only on its earlier denial of the motion for leave, the court concluded that the bid-fraud theory was an "entirely separate theory of fraud that [Kazakhstan] did not [originally] seek leave to introduce." *Id.* It reasoned that Kazakhstan's previous allegations about the Stati Parties' misrepresentations of the LPG Plant's value had "accused petitioners of defrauding the tribunal directly," while the supposedly new theory did not. JA764-65. Therefore, resting solely on the basis that Kazakhstan had "simply elected not to raise" a theory of bid fraud, the district court denied reconsideration. JA765.

That decision was error thrice over. *First*, the district court abused its discretion by failing to consider, on the record as it then existed, whether it had

simply misunderstood Kazakhstan's earlier filings. As the reconsideration motion made clear, when Kazakhstan "accused petitioners of defrauding the tribunal directly," (JA764-65), it was because ***the Stati Parties' experts relied on the fraudulent KMG bid in their submissions to the Panel***. *See* JA388 (arguing that "the Stati Parties relied upon their fraud during the SCC Arbitration by claiming, through their expert witnesses, that the LPG Plant could be valued by reference to the KMG Indicative Offer"). Thus, the distinction on which the district court based its earlier order—the supposed difference between "evidentiary fraud" and "bid fraud"—was a fiction, because the Stati Parties' expert evidence was itself tainted by the same fraud that tainted the bids. *See id.* n.16 (quoting expert's report's assertion, offered in arbitration, that "[t]he offer made by state-owned KazMunaiGaz ... was $199 million for the LPG Plant," and that the bid served as "clear" evidence as to "the value of the LPG Plant").

As the reconsideration motion made plain, the ***exact*** evidence of fraud that Kazakhstan sought to present pertained to the inflation of the LPG Plant's construction costs. JA380-93. There was no reasonable basis for the court's conclusion—which provided the sole rationale for its denial of reconsideration—that Kazakhstan had somehow switched theories (and compiled hundreds of pages of evidence in support of its new one) in the thirteen days after its reply brief. By nevertheless hewing to the rationale that Kazakhstan's request for reconsideration

raised an "entirely separate theory of fraud" that Kazakhstan had "simply elected not to raise" two weeks earlier, JA765, the district court abused its discretion. *See Bausch v. Stryker Corp.*, 630 F.3d 546, 561-62 (7th Cir. 2010) ("[e]ven if [district] court was correct in" denying leave to amend on the basis of original filings, it erred under Rule 15 by "later refus[ing]" to "provide[] leave" after party's "clarification" established that proposed amendment presented "no new theory" and "was not futile").

Second, the district court should have considered whether its failure to grant reconsideration would work a "manifestly unjust" result. *Comp. Prof'ls*, 72 F.3d at 903. The English High Court has determined that a *prima facie* case exists that the Stati Parties' $498 million award resulted from an egregious fraud on the Panel. *See supra* at 16-19.[15] Yet when faced with the same evidence, and despite being informed by Kazakhstan of the English High Court's ruling and express rejection of the erroneous argument adopted by the district court in its original ruling, *see* JA709-23, the district court refused to let Kazakhstan even present its case, apparently concluding that even if the proffered evidence proved fraud, the balance

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[15] The English High Court further held that "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 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." JA744 ¶ 93.

of equities favored the fraudsters. JA765-66. That conclusion is particularly striking because if the evidence is to be believed, the district court's own ruling turns on a distinction—between "bid fraud" and "fraud on the tribunal"—that the Stati Parties themselves must have known was false when they advanced it. By nevertheless converting the award into a judgment of a United States court against a sovereign nation—without even considering whether doing so would further advance the Stati Parties' fraud—the district court abused its discretion.

Finally, in light of the foregoing, the district court abused its discretion by basing its denial of reconsideration solely on Kazakhstan's purported delay in detailing its fraud defense. To the extent there was any delay, it was brief and prejudiced no one: Kazakhstan first sought to raise that defense on April 5, 2016 (JA332-39); it moved for reconsideration roughly six weeks later (JA380-93); and then that motion and the Petition remained pending for twenty-two months until the district court's final ruling. *See* JA455-76; JA752-84. As the district court recognized, Kazakhstan fully elaborated on both the precise nature of its defense and the underlying evidence almost two years before the district court ruled on the Petition and just one week after the court ruled on its original motion. Even if the court had been correct that Kazakhstan changed its theory in that short time (which it was not), any prejudice from that brief delay pales in comparison to the substantial injustice of confirming as a U.S. judgment a half-billion award

procured against a foreign sovereign by fraud. *See Good Luck Nursing*, 636 F.2d at 577-78 (reconsideration proper where "the interest that litigation must someday end was only slightly impinged, while the countervailing interest that justice be done was seriously at stake").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below or, in the alternative, vacate the judgment and remand.

Respectfully submitted,

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October 15, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of D.C. Cir. R. 32(e)(2)(B)(1) because this brief contains 12,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

October 15, 2018

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 15, 2018. Service upon participants in the case who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

/s/ Jonathan S. Franklin
Jonathan S. Franklin

October 15, 2018

Counsel for Appellant

ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

STATUTE

TREATIES

RULES

court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 692.)

EFFECTIVE DATE

Section effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States (Dec. 29, 1970), see section 4 of Pub. L. 91–368, set out as a note under section 201 of this title.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

EFFECTIVE DATE

Section effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States (Dec. 29, 1970), see section 4 of Pub. L. 91–368, set out as a note under section 201 of this title.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

EFFECTIVE DATE

Section effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States (Dec. 29, 1970), see section 4 of Pub. L. 91–368, set out as a note under section 201 of this title.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

EFFECTIVE DATE

Section effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States (Dec. 29, 1970), see section 4 of Pub. L. 91–368, set out as a note under section 201 of this title.

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

EFFECTIVE DATE

Pub. L. 101–369, §3, Aug. 15, 1990, 104 Stat. 450, provided that: ''This Act [enacting this chapter] shall take effect upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States.'' The Convention entered into force for the United States on Oct. 27, 1990.

§ 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ''the Convention'' shall mean the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

EFFECTIVE DATE

Section effective upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States (Oct. 27, 1990), see section 3 of Pub. L. 101–369, set out as a note under section 301 of this title.

§ 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

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ment shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive

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THE ENERGY CHARTER TREATY

LE TRAITE SUR LA CHARTE DE L'ENERGIE

VERTRAG ÜBER DIE ENERGIECHARTA

TRATTATO SULLA CARTA DELL'ENERGIA

ДОГОВОР К ЭНЕРГЕТИЧЕСКОЙ ХАРТИИ

EL TRATADO SOBRE LA CARTA DE LA ENERGÍA

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PART V

DISPUTE SETTLEMENT

ARTICLE 26

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

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(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

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(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

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(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

ENGLISH

ARBITRATION RULES

2010

ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

EFFICIENTLY FACILITATING ARBITRAL PROCEEDINGS IN INTERNATIONAL DISPUTES SINCE 1917

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Article 3 Registration Fee

(1) Upon filing the Request for Arbitration, the Claimant shall pay a Registration Fee. The amount of the Registration Fee shall be determined in accordance with the Schedule of Costs (Appendix III) in force on the date when the Request for Arbitration is filed.

(2) If the Registration Fee is not paid upon filing the Request for Arbitration, the Secretariat shall set a time period within which the Claimant shall pay the Registration Fee. If the Registration Fee is not paid within this time period, the Secretariat shall dismiss the Request for Arbitration.

Article 4 Commencement of arbitration

Arbitration is commenced on the date when the SCC receives the Request for Arbitration.

Article 5 Answer

(1) The Secretariat shall send a copy of the Request for Arbitration and the documents attached thereto to the Respondent. The Secretariat shall set a time period within which the Respondent shall submit an Answer to the SCC. The Answer shall include:

(i) any objections concerning the existence, validity or applicability of the arbitration agreement; however, failure to raise any objections shall not preclude the Respondent from subsequently raising such objections at any time up to and including the submission of the Statement of Defence;

(ii) an admission or denial of the relief sought in the Request for Arbitration;

(iii) a preliminary statement of any counterclaims or set-offs;

(iv) comments on the number of arbitrators and the seat of arbitration; and

(v) if applicable, the name, address, telephone number, facsimile number and e-mail address of the arbitrator appointed by the Respondent.

(2) The Secretariat shall send a copy of the Answer to the Claimant. The Claimant shall be given an opportunity to submit comments on the Answer.

(3) Failure by the Respondent to submit an Answer shall not prevent the arbitration from proceeding.

Article 6 Request for further details

The Board may request further details from either party regarding any of their written submissions to the SCC. If the Claimant fails to comply with a request for further details, the Board may dismiss the case. If the Respondent fails to comply with a request for further details regarding its counterclaim or set-off, the Board may dismiss the counterclaim or set-off. Failure by the Respondent to otherwise comply with a request for further details shall not prevent the arbitration from proceeding.

Article 7 Time periods

The Board may, on application by either party or on its own motion, extend any time period which has been set for a party to comply with a particular direction.

Article 8 Notices

(1) Any notice or other communication from the Secretariat or the Board shall be delivered to the last known address of the addressee.

(2) Any notice or other communication shall be delivered by courier or registered mail, facsimile transmission, e-mail or any other means of communication that provides a record of the sending thereof.

(3) A notice or communication sent in accordance with paragraph (2) shall be deemed to have been received by the addressee on the date it would normally have been received given the chosen means of communication.

Article 9 Decisions by the Board

When necessary the Board shall:

(i) decide whether the SCC manifestly lacks jurisdiction over the dispute pursuant to Article 10 (i);

(ii) decide whether to consolidate cases pursuant to Article 11;

(iii) decide the number of arbitrators pursuant to Article 12;

(iv) make any appointment of arbitrators pursuant to Article 13;

(v) decide the seat of arbitration pursuant to Article 20; and

(vi) determine the Advance on Costs pursuant to Article 45.

Article 10 Dismissal

The Board shall dismiss a case, in whole or in part, if:

(i) the SCC manifestly lacks jurisdiction over the dispute; or

(ii) the Advance on Costs is not paid pursuant to Article 45.

Article 11 Consolidation

If arbitration is commenced concerning a legal relationship in respect of which an arbitration between the same parties is already pending under these Rules, the Board may, at the request of a party, decide to consolidate the new claims with the pending proceedings. Such decision may only be made after consulting the parties and the Arbitral Tribunal.

Composition of the Arbitral Tribunal

Article 12 Number of arbitrators

The parties may agree on the number of arbitrators. Where the parties have not agreed on the number of arbitrators, the Arbitral Tribunal shall consist of three arbitrators, unless the Board, taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator.

Article 13 Appointment of arbitrators

(1) The parties may agree on a different procedure for appointment of the Arbitral Tribunal than as provided under this Article. In such cases, if the Arbitral Tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time period, within the time period set by the Board, the appointment shall be made pursuant to paragraphs (2)–(6).

(2) Where the Arbitral Tribunal is to consist of a sole arbitrator, the parties shall be given 10 days within which to jointly appoint the arbitrator. If the parties fail to make the

appointment within this time period, the arbitrator shall be appointed by the Board.

(3) Where the Arbitral Tribunal is to consist of more than one arbitrator, each party shall appoint an equal number of arbitrators and the Chairperson shall be appointed by the Board. Where a party fails to appoint arbitrator(s) within the stipulated time period, the Board shall make the appointment.

(4) Where there are multiple Claimants or Respondents and the Arbitral Tribunal is to consist of more than one arbitrator, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such joint appointment, the Board shall appoint the entire Arbitral Tribunal.

(5) If the parties are of different nationalities, the sole arbitrator or the Chairperson of the Arbitral Tribunal shall be of a different nationality than the parties, unless the parties have agreed otherwise or unless otherwise deemed appropriate by the Board.

(6) When appointing arbitrators, the Board shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.

Article 14 Impartiality and independence

(1) Every arbitrator must be impartial and independent.

(2) Before being appointed as arbitrator, a person shall disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence. If the person is appointed as arbitrator, he/she shall submit to the Secretariat a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to that person's impartiality or independence. The Secretariat shall send a copy of the statement of impartiality and independence to the parties and the other arbitrators.

(3) An arbitrator shall immediately inform the parties and the other arbitrators in writing where any circumstances referred to in paragraph (2) arise during the course of the arbitration.

Article 15 Challenge to arbitrators

(1) A party may challenge any arbitrator if circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not possess qualifications agreed by the parties. A party may challenge an arbitrator whom it has appointed or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment was made.

(2) A challenge to an arbitrator shall be made by submitting a written statement to the Secretariat setting forth the reasons for the challenge within 15 days from when the circumstances giving rise to the challenge became known to the party. Failure by a party to challenge an arbitrator within the stipulated time period constitutes a waiver of the right to make the challenge.

(3) The Secretariat shall notify the parties and the arbitrators of the challenge and give them an opportunity to submit comments on the challenge.

(4) If the other party agrees to the challenge, the arbitrator shall resign. In all other cases, the Board shall make the final decision on the challenge.

Article 16 Release from appointment

(1) The Board shall release an arbitrator from appointment where:

(i) the Board accepts the resignation of an arbitrator;

(ii) a challenge to the arbitrator under Article 15 is sustained; or

(iii) the arbitrator is otherwise prevented from fulfilling his/her duties or fails to perform his/her functions in an adequate manner.

(2) Before the Board releases an arbitrator, the Secretariat may give the parties and the arbitrators an opportunity to submit comments.

Article 17 Replacement of arbitrators

(1) The Board shall appoint a new arbitrator where an arbitrator has been released from his/her appointment pursuant to Article 16, or where an arbitrator has died. If the arbitrator being replaced was appointed by a party, that party