decision

AMSTERDAM

civil-law and tax law division, team I

case number: 200.224.067/01

decision given by the three-judge division for civil matters of 14 July 2020

in the matter of

1. **Anatoli STATI**,
living in Chisinau, Moldova,
2. **Gabriel STATI**,
living in Chisinau, Moldova,
3. **ASCOM GROUP S.A.**, with registered office in Chisinau, Moldova, and
4. **TERRA RAF TRANS TRAIDING LTD**.,
with registered office in Gibraltar,
applicants,
represented by: K.J. Krzeminski LLM of Rotterdam,

and

1. **REPUBLIC OF KAZAKHSTAN**,
seated in Astana, Kazakhstan,
including:
REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),
seated in Astana, Kazakhstan,
represented by: A.W.P. Marsman LLM of Amsterdam, and
2. **SAMRUK-KAZYNA JSC**,
seated in Astana, Kazakhstan,
represented by: H.F. van Druten LLM of Amsterdam,
respondents.

1. The further course of the proceedings

The parties will hereinafter be referred to as Stati et al. (the applicants collectively), Kazakhstan, National Fund and Samruk.

In this matter an interim decision was given by the Court of Appeal on 6 November 2018. For the course of the proceedings up to that date reference is made to this interim decision. In the interim decision it was by mistake not mentioned that Stati et al. had submitted further exhibits with numbers 9 - 38, which were received by the Court of Appeal on 15 June 2018.

Subsequently Kazakhstan filed a motion following an interim decision, containing annexes numbered 39 - 111, which were received on 5 February 2019.

Thereupon Stati et al. also filed a motion following an interim decision, plus annexes numbered 46 - 122, which were received on 16 April 2019.

By letter of 2 August 2019 containing an enclosure Kazakhstan requested that Stati et al. be ordered to pay the actual costs of the proceedings, for the reasons explained in the letter.

Kazakhstan has filed a number of further exhibits, which were received by the court registry on 16 August 2019 (exhibits 112 - 119), 20 August 2019 (exhibits 120 - 122) and 27 August 2019 (exhibit 123).

On the part of Kazakhstan a USB flash drive (encrypted) was furthermore submitted, but without the corresponding access code, thus preventing the Court of Appeal from taking note of its contents.

Stati et al. submitted a number of further exhibits, which were received by the court registry on 19 August 2019 (exhibits 165 - 167).

The continued oral hearing of the request took place on 27 August 2019. On that occasion the following persons appeared on the part of Stati et al.: the aforementioned counsel Krzeminski, M. van de Hel-Koedoot LLM, lawyer practising in Amsterdam and T.R. Vaal LLM, lawyer practising in Rotterdam, while on the part of Kazakhstan the following persons appeared: the aforementioned counsel Marsman and M. Gerrits LLM, I.S. Timman LLM and R.W. Ledeboer LLM, all of them lawyers practising in Amsterdam. Samruk was represented by H.F. van Druten LLM, lawyer practising in Amsterdam. Kazakhstan on the one hand and Stati et al. on the other hand explained their positions in greater detail on the basis of notes of oral pleading which had been submitted to the Court of Appeal. Also appearing on the part of Stati et al. was E. Dzhazoijan, lawyer at King & Spalding in London.

Subsequently a date was scheduled for judgment to be rendered.

2. Facts

The Court of Appeal will take the facts to be set forth below as the basis for its views. These facts follow from those arguments of the parties that have not been challenged or from the uncontested, or insufficiently contested, contents of exhibits referred to by the parties in substantiation of their arguments.

2.1 In the period 1999 - 2004 Stati et al. acquired, or indirectly acquired, the shares in two Kazakh companies, namely Kazpolmunay LLP, hereinafter KPM, and Tolkynneftegaz LLP, hereinafter TNG. KPM owned the rights to exploit the Borankol oilfield, whereas TNG could exploit the Tolkyn and Tabyl Block oilfields, all of them situated in Kazakhstan. TNG was to build a liquified petroleum gas plant at the Borankol field, hereinafter: the LPG plant. In 2010, following a dispute between the parties, the rights to exploit the oil fields ended.

2.2 As a result of all this Stati et al. decided to initiate arbitral proceedings before an arbitral tribunal subject to the arbitration rules of the Arbitration Institute associated with the Stockholm Chamber of Commerce, hereinafter: the arbitral tribunal and the SCC respectively. Article 26 (3) of the Energy Charter Treaty of 17 December 1994, hereinafter: the ECT, formed the basis of those arbitral proceedings. On 19 December 2013 an arbitral award was given by the arbitral tribunal, which award was subsequently supplemented by arbitral award of 17 January 2014. In its awards the arbitral tribunal held that Kazakhstan had violated its obligations towards Stati et al. under the ECT and ordered Kazakhstan to pay to Stati et al., after deducting certain debts, compensation in the amount of USD 497,685,101.

Included in this amount was an amount in damage to the LPG plant, which had been set at USD 199 million. No appeal lies against the arbitral awards.

2.4 Thereupon Kazakhstan requested the court of competent jurisdiction in Stockholm (Svea Hovrätt) to set aside the arbitral awards. In its judgment of 9 December 2016 the Swedish court dismissed Kazakhstan's claim. Against this judgment of the Swedish court Kazakhstan filed an extraordinary appeal (to the effect that the arbitral awards should be set aside on account of "grave procedural error"), which appeal was dismissed by the Swedish Supreme Court by judgment of 24 October 2017. No further appeals have been brought against the judgment whereby the claim for the setting aside of the judgment was dismissed.

3. The further examination of the case

3.1 Reference is made to the findings and the conclusions of the interim decision, the contents of which are to be regarded as repeated and incorporated herein. This case concerns the request of Stati et al. to recognize the arbitral awards and to be granted leave to enforce those awards.

3.2 By way of the interim decision Kazakhstan was given the chance to study the documents that had become available on 15 June 2018, further to the "disclosure" in the English proceedings before the High Court, and to submit a selection of these documents to the Court of Appeal and an explanation with respect to these documents in writing. In that same decision Kazakhstan was also given the opportunity to submit the judgment of the High Court, which was expected to be rendered before the end of 2019. It was furthermore ruled that Stati et al. would be given the chance to reply by means of a motion and that subsequently a continuation of the oral hearing would be ordered.

3.3 In its motion Kazakhstan stated that the English proceedings before the High Court had been withdrawn, so that no final judgment could be submitted in the proceedings. In that same motion Kazakhstan also, on the basis of the newly-obtained documents, explained in more detail the fraud which allegedly had occurred in the arbitral proceedings, while it also repeated and supplemented its application pursuant to article 843a DCCP. Stati et al. disputed all this in their motion, after which the parties once again provided an oral explanation of their positions.

3.4 Stati et al.'s request for the recognition and enforcement of the arbitral awards is based on article 1075 DCCP in conjunction with the articles III and IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Treaty Series 1959, 58), hereinafter: the New York Convention. Kazakhstan has not disputed the applicability of article 1075 DDCC and of the New York Convention. Since the arbitral awards were made in the contracting state Sweden, the Court of Appeal will proceed on the basis of the applicability of the New York Convention, and hence of article 1075 DCCP. By way of a defence Kazakhstan has argued that the recognition and enforcement should be refused on the grounds stated in article V of the New York Convention. To that end it first of all argues that the arbitral awards were fraudulently obtained and that the recognition and enforcement of those awards would therefore be contrary to public policy as referred to in article V (2) of the New York Convention. In the second place Kazakhstan argues that the grounds for refusal as referred to in article V (1) (a), (b), (c) or (d) exists. The grounds for refusal alleged by Kazakhstan will be discussed and examined below.

Procedural fraud

3.5 Kazakhstan argues that the arbitral awards were rendered through fraud on the part of Stati et al. In order for a request for recognition and leave to enforce an award to be denied on that ground, it is not enough that, after the arbitral awards are made, it has appeared that the positions taken by Stati et al. in the arbitral proceedings were (in part) incorrect or incomplete. To cross the threshold of procedural fraud alleged by Kazakhstan, more is required than this mere (partial) incorrectness or incompleteness of those allegations. It has to concern facts and circumstances that became clear after the arbitral proceedings, for which Stati et al. can be held responsible, and of such a serious nature that the arbitral awards should not have legal effect. In order for this to be so the least that is required is that Stati et al. have intentionally misled the arbitral tribunal, while their actions must furthermore have had a substantial influence on the formation of the arbitral awards.

3.6 When examining the existence of this ground for refusal, it should moreover be kept in mind that it is for the arbitral tribunal to examine the original dispute between the parties. In accordance with the applicable article 1075 (2) in conjunction with article 985 DCCP the court before which enforcement is sought should refrain from examining the matter once again. Also relevant is the fact that the Swedish court that was requested to set aside the awards has already given a decision on the question if the arbitral awards came about as a result of fraud and has answered this question in the negative. Although the Dutch court before which enforcement is sought has to decide independently on the existence of the ground for refusal and Kazakhstan has in certain parts supplemented its allegations regarding the fraud in these proceedings, there is nevertheless a strong indication in the decision by the Swedish court that was requested to set aside the awards that no procedural fraud has been committed.

3.7 It should furthermore be noted that the judgment of the English High Court of 6 June 2017 (see ground 2.16 of the interim decision) that there is a prima facie case of fraud concerns a preliminary opinion only, which by its nature does not have binding effect when it comes to the examination of the merits of the case.

Fraud with regard to the costs of the LPG plant

3.8 Kazakhstan claims that in the arbitral proceedings Stati et al. have made fraudulent representations and have withheld information about the construction costs of the LPG plant. Stati et al. have falsely represented to the arbitral tribunal that they spent at least USD 245 million on the construction of the LPG plant. However, these constructions were set up by Stati et al. with a view to fraudulently increasing the construction costs. Stati et al. first of all caused Perkwood, about which they had failed to disclose in the arbitral proceedings that this was an affiliated party, to charge a management fee of USD 43,852,108 to TNG without there being a contractual ground for doing so and without any services being provided in return. Secondly, Azalia, being another party affiliated with Stati et al., purchased USD 35 million in parts and by way of Perkwood sold these to TNG again at the artificially inflated price of USD 93 million. In the third place, Stati et al. entered fictitious parts in their accounts, for an amount of USD 31 million as the Court of Appeal understands it, and fourthly Stati et al. made TNG pay an amount of USD 72 million for parts that were never delivered. Stati et al. furthermore falsely represented to the arbitral tribunal that the bid of KMG (KazMunaiGaz) represented a reliable indication for the value of the LPG plant.

In 2008, Stati et al. suggested to the potential buyers of the LPG plant, one of which was KMG, that the construction costs of the plant at that time were approximately USD 193 million, despite knowing that this was not true. If the arbitral tribunal had known that KMG's bid was based on fictitious costs brought up by way of transactions with parties affiliated with Stati et al., it would never have considered the bid in question a reliable indication of the value of the LPG plant, all this according to Kazakhstan.

3.9 All this has been disputed by Stati et al. No fictitious parts were ever claimed, nor were prices of parts ever wrongly increased. The prices of parts were increased because costs had been incurred for transport, insurance and services, because of a currency conversion from euros into dollars and because of a surcharge for management fees. Those management fees were charged for a reason. Perkwood actually did as such perform services to TNG for the benefit of the construction of the LPG plant. The parts in the amount of USD 72 million were delivered. According to documents on the part of Kazakhstan these parts were in 2010 discovered at the LPG plant. Stati et al. furthermore never concealed that Perkwood was an affiliated party. Stati et al. in any case has never had the intention to mislead the arbitral tribunal. Stati et al. finish their defence by claiming that the alleged fraud had no influence on the arbitral awards. The Court of Appeal considers as follows.

3.10 The arbitral awards demonstrate that in the course of the arbitral proceedings the parties extensively debated the valuation of the LPG plant and the amount of compensation to be determined on the basis of that valuation. According to the arbitral awards, Stati et al. in those proceedings took the view that the plant had to be valued in accordance with the expected Discount Cash Flow (DCF), which by their expert FDI had been calculated at USD 408.3 million. According to them the scrap value did not represent adequate compensation for the LPG plant which had been taken possession of by Kazakhstan and which Kazakhstan wanted to operate at full capacity. Stati et al. in any case wanted to have their investment costs compensated, plus the value, or a part of the value, which they might have achieved when putting the LPG plant into service for the purpose of processing the 'Contract 302' gas. Up to July 2009, Stati et al. had estimated their investments at USD 245 million and the expected value upon putting the LPG plant into service for the 'Contract 302' gas at an amount of USD 329 million, so that, once the LPG plant had been put into service, the expected value would exceed the costs by an amount of USD 84 million. Stati et al. furthermore pointed out that that they might have sold the LPG plant to a third party, which party might have processed its own gas in the LPG plant. In that respect, they pointed at KMG's indicative bid of USD 199 million in September 2008. In the arbitral proceedings Kazakhstan adopted the position that the LPG plant was a 'failed project' and that for that reason Stati et al. could not claim damage in respect of the plant, but the scrap value at most, but that nothing about that had been brought forward by Stati et al. According to Kazakhstan, Stati et al. wrongly pointed at the investment value or the book value, since these do not adequately reflect the market value. After all, a hypothetical buyer would not have been interested in the amount of the investments, but in the revenue it might expect. Kazakhstan referred to its expert Deloitte, who had come to the conclusion that the plant represented a negative value of USD 89.9 million. In that calculation, Deloitte based itself on the DCF method and on the estimate that another USD 100 million would have to be spent in order to finish the LPG plant. Kazakhstan also referred to reports from the expert engaged by it, namely GCA (Gaffney, Cline & Associates), which specify that another USD 100 million (at least) was necessary to finish the plant and put it into service.

Kazakhstan also pointed out that the bids of KPM and others did not represent the FMV (fair market value), because, according to witness statements, these bids had been made for strategic reasons only, namely to get access to the data room. Kazakhstan furthermore disputed having had the intention to complete the LPG plant.

3.11 Further to the debate between the parties, the arbitral tribunal found that it was not convinced by the conclusion drawn by Kazakhstan's experts that the LPG plant was a 'failed project', as in that case Kazakhstan would not have been prepared to make any further investments in the completion of the construction works, which investments it nevertheless did make, as evidenced by the documents. The arbitral tribunal furthermore held that it had taken note of the parties' extensive arguments, based on their expert reports, but that it did not have to assess those reports and their greatly diverging outcomes. In the view of the arbitral tribunal 'the relatively best source' for the valuation of the plant are the bids for that plant, which were tendered around October 2008, for the potential buyers made their bids for the LPG plant in the expectation that it would become operational. This means that the arbitral tribunal made its own choice in determining the value, in which respect it clearly allowed itself to be guided by the focus of both parties on the operational value of the LPG plant. The arbitral tribunal did not address the parties' arguments with regard to that operational value, which mainly focused on the outcome of the valuation by the experts of both parties. Instead, the arbitral tribunal made a reasoned choice for the 2008 bids from the multiplicity of facts presented by the parties, particularly the bid made by KMG, as the relatively best source for the valuation of the LPG plant. With that choice, the arbitral tribunal showed that it considered the operational value of the LPG plant decisive when determining the fair value, for it is that value which arises from the bids. These being strategic bids only and not a price the bidders were prepared to pay was not accepted by the arbitral tribunal. The above implies that, when determining the value of the LPG plant, the arbitral tribunal attached no significance to the costs invested in it. The debate between the parties in the arbitral proceedings in part concerned the question if those investment costs would have to be of significance to the valuation of the LPG plant. The arbitral tribunal made the choice not to use the investment costs as a basis, something that for that matter had also been argued by Kazakhstan. The conclusion is that the position adopted by Stati et al., i.e. that it has invested USD 245 million in the LPG plant, has not had any substantial influence on the outcome of the arbitral proceedings.

3.12 Kazakhstan has furthermore argued in these proceedings that the investment costs declared, or falsely declared, by Stati et al. by way of the bids have indirectly affected the outcome of the arbitral proceedings. To that end, it alleges that in the summer of 2008 Stati et al. had for the benefit of (inter alia) TNG drawn up a so-called information memorandum, in which they mentioned that up to 1 July 2008 TNG had invested an amount of USD 193 million in the LPG plant. These costs too had been falsely inflated in the manner described above, meaning that KMG's bid was falsely obtained, as the text of the bid shows that it was in part based on the construction costs listed by Stati et al. If the arbitral tribunal had known this, it would never have characterized KMG's bid as the relatively best source for the valuation, all this according to Kazakhstan. Further to this argument the Court of Appeal considers as follows. In its reasoning with respect to the valuation of the LPG plant the arbitral tribunal found that in the bids the plant was on average valued at an amount of USD 150 million. Next the arbitral tribunal pointed out the special significance of the bid of KMG, an undertaking owned by Kazakhstan, in the amount of USD 199 million and fixed the amount of the damage to be compensated by Kazakhstan at this same amount. This means that the damage was not only determined on the basis of KMG's bid, but that the arbitral tribunal also considered the other bids. According to the reasons stated for their bids by the bidders, these were either based on the DCF method, or no valuation method was given.

Moreover, according to the accompanying text, KMG's bid was only in part based on the construction costs. The value of the LPG plant was calculated as the mathematical average of the value on the basis of the operational profits (EBITDA) and the value based on the historic costs. The bid of USD 199 million is close to, and is even slightly higher than, the – according to Kazakhstan fraudulent – amount of the reported construction costs of USD 193 million. This means that apparently KMG estimated the value based on the operational costs equal to, or higher than, the construction costs, which is why it is not automatically clear that the reported construction costs of USD 193 million have affected the size of KMG's bid, let alone the size of the other bids. Moreover, it is mere speculation to assume that the arbitral tribunal, knowing that the actual construction costs were lower than the buyers had been led to believe, had not regarded the bids as the relatively best source for the valuation of the LPG plant, as does Kazakhstan. The arbitral tribunal might after all even then still have assumed that the potential buyers, and KMG as a Kazakh state-owned company in particular, were as informed parties more than anyone else aware of the (operational) value of the LPG plant. In that respect, it should be borne in mind that the arbitral tribunal has expressly dismissed Kazakhstan's defence that strategic bids only were made so as to gain access to the data room – where the bidders might have viewed the investment costs. Besides, it is by no means clear that in the summer of 2008, even before a dispute had arisen between the parties, Stati et al. organized all this intentionally, so as to be able to influence the arbitral tribunal in arbitral proceedings that were not yet pending in those days. Kazakhstan has argued nothing that might justify such a conclusion. Another argument against this is that it is true that in the arbitral proceedings Stati et al. did mention the bids, and KMG's bid in particular, but that they did not adopt the position that the arbitral tribunal should regard those bids as leading when determining the damage.

3.13 Also important in the present examination of the case is that in the arbitral proceedings it was never disputed by Kazakhstan that construction costs were the size stated by Stati et al. All that was argued by Kazakhstan was that the construction costs of USD 245 million mentioned by Stati et al. were irrelevant, because the value to be considered was the fair market value (FMV) of the LPG plant, which in Kazakhstan's view was much lower than the construction costs, because the LPG plant would never be profitable. On the contrary: in the arbitral proceedings Kazakhstan relied on the GCA expert opinion which it had submitted, in which it is written that an estimated investment of USD 320 million is reasonable 'for the plant as designed' and furthermore that at the time the report was prepared the LPG plant was 75 to 90% finished (according to Kazakhstan even 80 to 90%). This means that the amount mentioned by Stati et al. does not significantly differ from the amount in reasonable costs mentioned by Kazakhstan's expert, allowing for the part of the plant that had been completed in the expert's view (i.e. 75% of 320 million, so USD 240 million). Even if the completion costs estimated by the expert of USD 100 million are deducted, the investment still amounts to USD 220 million, which amount does not significantly differ from the construction costs mentioned by Stati et al. either. Against this background it is difficult to see that Stati et al. had falsely and incorrectly informed the arbitral tribunal about the construction costs, let alone that the arbitral tribunal allowed itself to be guided by this. If the arbitral tribunal had assumed the reasonable costs according to Kazakhstan's expert opinion, it would have used a similar amount in construction costs as its basis.

3.14 In that respect it should furthermore be borne in mind that, at the time of the arbitral proceedings, Kazakhstan was already conducting the management of the LPG plant and for that reason had an insight into the actual condition of the plant in question. It has not been disputed by Kazakhstan that at that moment TNG's accounts were also available to it, meaning that Kazakhstan had every opportunity in the arbitral proceedings to get a proper impression of the costs that had already been incurred for the LPG plant, and about the reasonably incurred costs in any case. The GCA also shows that GCA employees had actually inspected the LPG plant, so that there was nothing to prevent Kazakhstan from adopting a reasoned position about the costs that might reasonably have to be taken into account for the construction project.

3.15 It should furthermore be considered that a difference of opinion may exist about the question as to which costs may in fairness be allocated to the construction of the LPG plant. Consequently, positions taken in that respect should not automatically be labelled as fraud, if in hindsight these should prove (partly) incorrect. In the present case, however, there was no difference of opinion in the arbitral proceedings about the amount of the costs reasonably to be made. All the more so that the positions taken by Stati et al. in the arbitral proceedings should not too readily be labelled as fraudulent. It may be inferred from Kazakhstan's specific arguments in these proceedings regarding the alleged fraud and from the documents submitted by it in that respect, that TNG, whose shares were owned by Stati et al. in those days, had made payments to Perkwood and Azalia, which are other entities affiliated with Stati et al., without there being a clear factual or legal ground for those payments. However, that does not make all this a case of procedural fraud, as argued by Kazakhstan, if only because there is no evidence that the payments concerned were made for the purpose of fraudulently inflating the value of the LPG plant in the arbitral proceedings. This being so is not very likely in any case with respect to the costs that were incurred and included in the information memorandum provided to the bidders, for these were all of them costs that had been incurred and entered in TNG's accounts before the dispute between the parties had arisen. It is furthermore noted that it has been insufficiently established that costs were intentionally claimed for parts that were not necessary or were not delivered. In the present proceedings, Stati et al. have disputed with reasons that fictitious parts had been entered into the books or parts had not been delivered, while no circumstances have been argued by Kazakhstan in this respect either that might indicate any deliberate actions on the part of Stati et al. in relation to the arbitral proceedings . All this being qualified as fraudulent transactions, in the sense that Stati et al. claimed costs that could not in fairness be allocated to the construction of the LPG plant, is also contradicted by the conclusions of Kazakhstan's expert, who after all does not actually challenge the total amount in investments made by Stati et al. The fact that, deliberately or otherwise, the above may not, or not correctly, have been accounted for in the accounts of the various entities affiliated with Stati et al., as has been suggested by Kazakhstan, is of insufficient significance in this respect. The total of the amounts that, in Kazakhstan's view, Stati et al. are alleged to have fraudulently claimed is more than USD 200 million. This too raises questions about the fraud alleged by Kazakhstan. The amount in actual investment costs that would remain after deduction of those allegedly fraudulent costs, i.e. no more than USD 45 million, is after all completely inconsistent with the real situation that was encountered by Kazakhstan's expert, thus making it even less likely that costs were fraudulently added.

3.16 In view of the above it is furthermore difficult to see how Stati et al.'s silence about the connection between Stati et al. on the one hand and the entities Perkwood and Azalia on the other hand should be qualified as fraud, as argued by Kazakhstan.

Since it has not been found that payments made to these entities by TNG should be regarded as fraudulent, it is after all no longer relevant if these parties were affiliated with Stati et al. or not, while remaining silent about this – which for that matter has been disputed by Stati et al. – is not to be regarded as procedural fraud either. It is for this reason that the Court of Appeal disregards the parties' debate about the matter.

3.17 The above means that with respect to the valuation of the LPG plant there is no evidence of any facts or circumstances of such a serious nature that the arbitral awards should be denied their legal effect. It has not been established that Stati et al. have intentionally misled the arbitral tribunal in the matter of the valuation, nor that the alleged misleading representations have substantially influenced the outcome of the arbitral awards.

Fraud in the matter of the liquidity shortage

3.18 In its statement of defence Kazakhstan has furthermore argued that the arbitral tribunal appears to attribute the liquidity shortage of TNG and KPM to its (i.e. Kazakhstan's) actions, whereas this liquidity shortage may very well have originated from the aforementioned fictitious construction costs of the LPG plant. According to Kazakhstan, this might have given rise to a different assessment by the arbitral tribunal of the causal link between its actions and the damage alleged by Stati et al. The Court of Appeal does not follow this line of reasoning, if only because it has been insufficiently established that the construction costs were fictitious. That the arbitral tribunal, if fictitious construction costs would have been established in the arbitral proceedings, would have adopted a different view on the causal link between Kazakhstan's actions and the damage alleged by Stati et al. is mere speculation, given the large number of facts that were considered by the arbitral tribunal in its assessment of that causal link.

3.19 In its motion following the interim decision Kazakhstan has also argued that, when studying the newly-submitted documents, it had appeared to it that Stati et al. had deceived the arbitral tribunal about the cause of their liquidity shortage, about the attempt to obtain a loan from Credit Suisse and about the so-called 'Laren transaction'. This transaction of June 2019 implied that Tristan Oil was to issue bonds to Laren Holding (hereinafter: Laren), that Laren would transfer these bonds to lenders who would provide Laren with a loan of USD 60 million, out of which loan the bonds would be paid and a loan of USD 30 million would be provided to TNG and KPM. It is alleged that the fraud consisted in the fact that it appears from newly-obtained documents, namely minutes of board meetings of Ascom of 14 and 22 October 2008, an e-mail from Standard Bank of 25 November 2008 and an internal e-mail of 11 December 2008, that in October 2008 Stati et al. had a liquidity shortage of USD 50 million in relation to their activities in Kazakhstan, that they were expecting a liquidity shortage for the first half of 2009, that they were looking for funds and that the recently-obtained internal e-mail of 11 December 2008 shows that Stati et al. considered the Credit Suisse loan too expensive and too restrictive. A settlement agreement that was only recently acquired furthermore shows that Laren was affiliated with Stati et al., while newly-obtained e-mail correspondence between Fitch Ratings and Stati et al. shows that as a result of, or partly as a result of, the actions of Stati et al., Fitch Ratings had decided to lower the credit rating of the bonds issued by Tristan Oil. Lastly, newly-obtained documents show that Stati et al. were actively involved in the negotiations in the matter of the Laren transaction and that they had successfully negotiated favourable conditions for themselves, whereas in the arbitral proceedings they argued that they had had to enter into the Laren transaction subject to very unfavourable conditions.

If the newly-obtained documents had been known to the arbitral tribunal, it would have given a different decision about the causal link between its actions and the damage alleged by Stati et al., all this according to Kazakhstan.

3.20 Stati et al. filed a motion containing the following reply. They had never alleged in the arbitral proceedings that the liquidity issues in late 2008 were due to Kazakhstan's actions, nor that Kazakhstan's actions were the only source of their liquidity problems. The documents currently referred to by Kazakhstan were therefore irrelevant to the dispute in the arbitral proceedings. In addition, Stati et al. submitted and explained the "term sheet" of 5 December 2008 in the arbitral proceedings, containing the conditions that Credit Suisse had imposed for the loan, so that Kazakhstan (and, as the Court of Appeal understands it: the arbitrators as well) could themselves assess the terms of that loan. Stati et al. furthermore explained why E. Kasumov, who did indeed represent them, in December 2011 had co-signed the settlement agreement on behalf of Laren. According to Stati et al. the settlement agreement therefore does not prove that Laren was an affiliated party. Stati et al. furthermore argue that in the arbitral proceedings they had submitted the substantiation by Fitch of the credit rating, which contained the same issues as those in the e-mail correspondence referred to by Kazakhstan. As a result, there was no reason to submit this correspondence in the arbitral proceedings. In conclusion, Stati et al. point out that they had submitted the final documents concerning the Laren transaction in the arbitral proceedings. This means that not one agreed condition had been withheld by them. Stati et al. have furthermore explained that, at the time of the arbitral proceedings, they had ceased to benefit from the favourable conditions referred to by Kazakhstan because they had defaulted on the loan and these conditions therefore no longer applied.

3.21 At the continued oral hearing (referred to in 1) Kazakhstan no longer replied to the factual information provided by Stati et al. in its aforementioned argument, so that the Court of Appeal will assume this factual information as correct. The Court of Appeal also agrees with Stati et al. with respect to their subsequent conclusion that the documents referred to by Kazakhstan in these proceedings were irrelevant in the arbitral proceedings, or in any case, that Stati et al. could reasonably take this view. It furthermore follows from the d that in the arbitral proceedings Stati et al. on each occasion submitted those documents that were most relevant to the examination of the case. It has not become apparent that it has deliberately held back documents with a view to harming Kazakhstan's position. The absence of the documents referred to by Kazakhstan therefore cannot be regarded as being so serious as to be classified as procedural fraud.

3.22 The following should be added to this. Stati et al. have rightly pointed out that, as was held by the arbitral tribunal in 349 of the arbitral award, Credit Suisse on 18 December 2008, further to a press release from INTERFAX, informed Stati et al. that it was not going to provide any loans until Stati et al. had resolved their dispute with Kazakhstan. In ground 994 of that award the arbitral tribunal draws the conclusion that it is obvious and not disputed by Kazakhstan that this press release had been published as a result of, or as a consequence of, Kazakhstan's actions. In ground 1416 the arbitrators subsequently explain that as a result of Kazakhstan's 'aggressive and forced actions, including the inspections, the criminal charges, and the asset seizures' Stati et al. were forced to accept the 'horrendous' conditions of the Laren transaction. In 1618 it is furthermore held by the arbitrators that, following an assessment of 'the timeline of events', they draw the conclusion that Kazakhstan's conduct, of which it had already been found that it constitutes a breach of the ECT, including the liquidity shortage, to the extent that this had also been caused by Kazakhstan, had compelled Stati et al. to reduce their efforts to develop the Borankol and Tolkyn fields.

In the light of these findings, Kazakhstan has absolutely insufficiently explained that the documents referred to by it might be essential to the arbitral tribunal's views regarding the causal link between Kazakhstan's actions and the damage suffered by Stati et al. Those documents after all do not concern the essence of the acts which Kazakhstan is said to have committed and which, in the arbitral tribunal's view, led to the damage in question.

3.23 The conclusion of all this is that in the matter of the liquidity shortage no procedural fraud can be established either.

Fraud other

3.24 Kazakhstan appears to assume (defence, 95) that the decision of the arbitral tribunal to award an amount of USD 31 million in investment costs as damage in relation to 'Contract 302 Properties', was arrived at through fraud. According to Kazakhstan, this concerned fictitious costs in the annual reports of TNG. However, Kazakhstan has not worked out this allegation in greater detail, so that the Court of Appeal will disregard it.

Other grounds for refusal

3.25 In conclusion, Kazakhstan has argued that recognition and enforcement should be refused because (a) the arbitral tribunal had not been composed in accordance with the applicable rules (article V (1) (d) New York Convention or article 1076 (1) (a) (b) DCCP), (b) it was not given proper notice of the appointment of the arbitrator appointed for it (article V (1) (b) New York Convention) and (c) there was no valid arbitration agreement, alternatively a violation of the conditions subject to which arbitration is provided for (article V (1) (a) and (c) New York Convention or article 1076 (1) (A) (a) DCCP). According to Kazakhstan, these grounds, both individually and when viewed in relation to each other, constitute a reason for refusing the request of Stati et al.

3.26 With respect to ground (a) Kazakhstan points out the following. Article 13 of the applicable Stockholm Chamber of Commerce Arbitration Rules 2010 (hereinafter the SCC Rules) state that, in the event that a party fails to appoint an arbitrator within 'the stipulated time period', the board of the SCC will do so. The board appointed arbitrator Lebedev in this way without being authorized to do so. The board did not stipulate a time period within which Kazakhstan had to appoint an arbitrator, as argued by Kazakhstan.

3.27 The sequence of events, as has also been outlined by Kazakhstan, was as follows. By letter of 5 August 2010, which was received on 9 August 2010, the secretariat of the SCC forwarded the request for arbitration on the part of Stati et al. to Kazakhstan, requesting that party to submit a reply by 26 August 2010 at the latest, in accordance with article 5 of the SCC Rules. Subsequently the secretariat, by letter of 27 August 2010, received on 31 August 2010, sent a reminder to Kazakhstan and extended the period for submitting a reply until 10 September 2010. It is an established fact that Kazakhstan has not replied within the time periods set by the SCC. Kazakhstan raises the question whether a time period as referred to in article 13 of the SCC Rules was at all set. The Court of Appeal answers this question in the affirmative. Article 5 of the SCC Rules, to which article the letter of the SCC of 5 August 2010 explicitly refers, provides that the answer shall include the name and further data of the arbitrator appointed by the respondent.

Contrary to what has been argued by Kazakhstan, the time period which Kazakhstan was set should also be viewed as the period within which it, as the respondent, had to appoint an arbitrator. This means that the situation of a party, i.e. Kazakhstan, failing to appoint an arbitrator within the time period it had been set, has materialized in this case. It was for this reason that the board of the SCC was entitled, upon expiry of the time period that had been set, to appoint an arbitrator itself, which it did by appointing Lebedev on 15 September 2010.

3.28 The above is not altered by the fact that on 13 September 2010 Stati et al. requested the board of the SCC to appoint an arbitrator on behalf of Kazakhstan and that Kazakhstan was unable to respond to that request before the appointment of Lebedev, because it did not hear of that request until 23 September 2010. After all, the board of the SCC was entitled under the provisions of article 13 of the SCC Rules alone, to appoint an arbitrator as soon as the time period which Kazakhstan had been set for appointing an arbitrator had expired. It has to be assumed that the board of the SCC decided to appoint an arbitrator when it did not get a reply from Kazakhstan and that it did not do so further to the request it had received from Stati et al. That request in any case is not the ground for the board's power to perform the appointment and for that reason is not of any importance in this respect, nor is the impossibility on the part of Kazakhstan to provide a timely response to that request.

3.29 The aforementioned events do not lead to the conclusion either, as argued by Kazakhstan, that it was not given proper notice of the appointment of Lebedev. After all, on 27 September 2010, so shortly after the appointment, Kazakhstan received a notice from the SCC about the appointment. It is difficult to see why this would be too late or improper. All this is not altered by the fact that Kazakhstan has not been able to respond to the request of Stati et al.

3.30 In this case, it is of no importance either that the SCC Rules state that the nature and the circumstances of the dispute must be considered. According to Kazakhstan, the board of the SCC should have considered that there is a certain slowness in the decision-making process within a government body, that Kazakhstan had to translate the documents and that it had not yet appointed counsel for the arbitral proceedings. These arguments are disregarded by the Court of Appeal, because these circumstances should in principle be for the account and risk of Kazakhstan as a professional party. If Kazakhstan considered the time period it had been set too short for submitting a full reply, stating the arbitrator appointed by it, it could have requested an extension for submitting a (full) reply. This it has not done, not immediately after it had learned of the appointment of Lebedev on 27 September 2010 either. The first time Kazakhstan replied to the letters and documents sent was by letter from its counsel of 8 November 2010, which letter merely contained a request to sent the case file. Not until 2 December 2010 did Kazakhstan object to the appointment of Lebedev. In this course of events there are no circumstances to be discovered which the SCC could not reasonably expect Kazakhstan to comply with the time period it had stipulated.

3.31 Kazakhstan furthermore claims that Stati et al. did not observe the cooling-off period of three months of article 26 (2) ECT. For that reason the arbitral tribunal is believed not to have jurisdiction to hear and determine the dispute, all this according to Kazakhstan. Stati et al. dispute that the cooling-off period has not been observed. Whatever may be of this, failing to observe a cooling-off period does not cause the arbitral tribunal to have no jurisdiction. The text of the ECT is not sufficient reason for drawing such a far-reaching conclusion. On the contrary: according to paragraph 3 of the aforementioned article Kazakhstan has unconditionally consented to any disputes being subjected to international arbitration.

For that reason Kazakhstan's conclusion that there is no valid arbitration agreement or that there is a violation of the conditions subject to which arbitration is provided for, is not shared by the Court of Appeal.

3.32 To this is added that Kazakhstan has not disputed that, prior to arbitration, Stati et al. had on various occasions pointed out the issues that had arisen between the parties, nor that the arbitral proceedings had been suspended with a view to complying with the requirement of the cooling-off period. In view of these circumstances, which have not been disputed by it, Kazakhstan has failed to explain that and in which way it has been prejudiced by these events. Insofar as it argues that, by observing a cooling-off period, it would have had sufficient time to prepare for the appointment of an arbitrator, the Court of Appeal once again points out that Kazakhstan has failed to apply for an extension of the time period that had been set. To that is added that the purpose of the cooling-off period is not to give the parties time to prepare for arbitral proceedings, but, on the other hand, to prevent these, by creating time for reaching an amicable settlement. In this case, that purpose would benefit from other means.

3.33 The aforementioned circumstances, viewed in relation to each other, do not constitute a reason either to dismiss the present request.

Violation of the duty to tell the truth

3.34 In its motion following the interim decision Kazakhstan has furthermore argued that in these proceedings before the Court of Appeal Stati et al. have on various points acted in violation of the duty to tell the truth pursuant to article 21 DCCP. According to Kazakhstan, Stati et al. are believed to have taken positions at the first oral hearing that are inconsistent with documents from their own accounts. The request for recognition and enforcement should be denied on that same ground. Stati et al. dispute having violated article 21 DCCP and furthermore argue that a violation does not constitute a separate ground for refusal.

3.35 The Court of Appeal finds that the grounds for refusing a request such as this one have been exhaustively set down in the New York Convention. Among these is not a violation of article 21 DCCP. Kazakhstan's argument should therefore be disregarded. Its allegations with respect to that violation moreover concern the same matter as the alleged fraud of Stati et al. in the arbitral proceedings, which the Court of Appeal has already given a decision on above.

Request pursuant to article 843a DCCP

3.36 In its motion following the interim decision Kazakhstan has written that it maintains its request in its letter of 15 May 2018 to the Court of Appeal, namely to be provided with copies of the following documents:
- agreements concerning the management fee paid to Perkwood and documents showing the services that were provided in exchange for this fee, and
- agreements between Azalea and Perkwood regarding the construction of the LPG plant, including those concerning the purchase and delivery of specifically identified parts.

3.37 Partly in view of what has been held above concerning the fraud alleged by Kazakhstan in the matter of the costs of the LPG plant, and more in particular with regard to the costs stated in respect of the management fee and the delivered parts, it cannot be seen what legitimate interest Kazakhstan has at this moment in inspecting those documents.

Kazakhstan in any case has not indicated any sufficiently specific interest in light of what has been held above.

3.38 The same applies to Kazakhstan's additional request to inspect the agreements between Azalea and Hayden, including the agreements 'for drilling equipment' and 'for LPG equipment'. In light of what has been held above, Kazakhstan has insufficiently specifically explained its interest in this request concerning these documents as well.

3.39 Kazakhstan also requests to be provided with, or to be given permission to inspect, all documents produced in the English proceedings. To that end it alleges as follows. Stati et al. have notified the English High Court that they have identified a total of 130,000 documents eligible for disclosure. Of these they have only disclosed 70,000. With respect to the remaining documents, they have refused to properly comply with the order to disclose these. Stati et al. have on dubious grounds refused to submit half of the documents, claiming that the other documents were probably privileged or irrelevant. Subsequently, Stati et al. ended the English recognition proceedings, before in those proceedings a decision had been given in respect of the request for leave to enforce. The Court of Appeal finds that the above does not constitute a sufficient reason in these Dutch proceedings to order Stati et al. to hand over the documents or allow these to be inspected. To that end Kazakhstan should have explained its legitimate interest as referred to in 843a DCCP in a concrete manner. This it has not done properly, or not sufficiently specifically in any case, so that there is no ground for the Court of Appeal to grant the request.

3.40 Kazakhstan also points at a 'specific disclosure' in the English procedure which Stati et al. are believed not to have complied with. According to Kazakhstan the documents might clarify the, in their view, fictitious price increase of delivered parts. In view of what has been held above, Kazakhstan has explained its interest insufficiently specifically with respect to these documents as well.

Conclusion

3.41 Since no ground to refuse Stati et al.'s request regarding Kazakhstan has been shown, the request will be granted. Kazakhstan's request pursuant to article 843 DCCP will be dismissed. As the party against which judgment is given Kazakhstan will be ordered to pay the costs of the proceedings incurred by Stati et al. At the same time this means that Kazakhstan's request to order Stati et al. to pay the real costs of the proceedings cannot be allowed, in the absence of a proper ground. In the interim decision it has already been held — on the grounds stated therein — that the request will be dismissed insofar as it is directed against National Fund and Samruk. As the party against which judgment is in that respect given Stati et al. will be ordered to pay the costs of the proceedings incurred by Samruk and National Fund.

3. The decision

The Court of Appeal:

recognizes and grants leave to enforce in the Netherlands the arbitral awards rendered between the parties in Stockholm, Sweden on 19 December 2013 and 17 January 2014;

dismisses Kazakhstan's request pursuant to article 843a DCC;

dismisses the request of Stati et al. insofar as it is directed against Samruk;

dismisses the request of Stati et al. insofar as it is directed against National Fund.

orders Kazakhstan to pay the costs of the proceedings incurred on the part of Stati et al. and estimates these costs thus far at EUR 716 in disbursements and at EUR 3,222 in fees;

orders Stati et al. to pay the costs of the proceedings incurred on the part of Samruk and estimates these costs thus far at EUR 726 in disbursements and at EUR 3,222 in fees;

orders Stati et al. to pay the costs of the proceedings incurred on the part of National Fund and estimates these costs thus far at EUR 726 in disbursements and at EUR 3,222 in fees;

This decision was rendered by D. Kingma, W.H.F.M. Cortenraad and A.M.A. Verscheure and pronounced in public by the cause list judge on 14 July 2020.

A.R.Sturhoofd