decision

AMSTERDAM

civil and tax law department, team I case number: 200.224.067/01

Order of the Multiple Civil Chamber of 14 July 2020

1. **Anatoli STATI,** living in
Chisinau, Moldavia, 2.
Gabriel STATI, living in
Chisinau, Moldavia,
3. ASCOM GROUP S.A., located in Chisinau, Moldavia, and
4. **TERRA RAF TRANS TRAIDING LTD.,** Gibraltar**,** applicants,

Attorney at law: K.J. Krzeminski, Rotterdam, and
1. REPUBLIC OF KAZAKHSTAN, having its registered office in Astana, Kazakhstan, including:
REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),
based in Astana, Kazakhstan,
Attorney at law: Mr. A.W.P. Marsman, Amsterdam, and
2. **SAMRUK-KAZYNA JSC,** established in Astana, Kazakhstan, lawyer: H.F. van Druten, Amsterdam, defendants.

1. The further course of the process

The parties are hereinafter referred to as Stati c.s. (the applicants jointly), Kazakhstan, National Fund and Samruk respectively.

In this case, the Court of Appeal issued an interim order on 6 November 2018. For the course of the proceedings up to that date, reference is made to this interim order. By mistake, the interim order does not mention that Stati et al. submitted further productions numbered 9 through 38, which were received by the Court of Appeal on 15 June 2018.

Kazakhstan subsequently lodged an instrument following an interim decision, numbered 39 to 111, received on 5 February 2019.

Stati c.s. also took a deed following an interim decision, with annexes numbered 46 to 122, received on 16 April 2019.

By letter of 2 August 2019 with annex, Kazakhstan requested Stati to pay the actual costs of the proceedings on the grounds set out in that letter.

Kazakhstan has submitted further works, received at the registry of bet hof on 16 August 2019 (works 112 to 119), 20 August 2019 (works 120 to 122) and 27 August 2019 (production 123).

On the part of Kazakhstan, a (secure) USB stick has also been brought into dispute, but without the corresponding access code so that the bet court has not been able to take note of the data on that USB stick.

Stati c.s. have submitted further productions, received at the registry of bet hof on 19 August 2019 (productions 165 to 167).

The continued oral hearing of the bet request took place on 27 August 2019.
H.F. van Druten, attorney at law in Amsterdam. Kazakhstan on the one hand and Stati c.s. on the other hand have further explained their points of view on the basis of pleading notes submitted to the court of appeal. E. Dzhazoijan, attorney at law with King & Spalding in London, also appeared on the side of Stati et al.

Subsequently, a verdict was reached.

2. Facts

In this case the court of appeal will take the following facts as a starting point. These facts result from the unchallenged statements of the parties or the (sufficiently) contested content of productions to which they refer in support of their statements.

2.1 Between 1999 and 2004 Stati c.s. acquired (indirectly) the shares in two Kazakh companies, Kazpolmunay LLP, KPM, and Tolkynneftegaz LLP, TNG. KPM held the exploitation rights for the Borankol oil field and TNG for the Tolkyn oil field and the Tabyl Block, all located in Kazakhstan. TNG was to build a liquified petroleum gas installation at the Borankol field, further: the LPG installation. In 2010, following a dispute between the parties, the exploitation rights for the oil fields were terminated.

2.2 Stati c.s. have instituted arbitration proceedings before an arbitral tribunal under the Rules of Arbitration of the Arbitration Institute attached to the Stockholm Chamber of Commerce, further: the arbitral tribunal and the SCC respectively. Article 26(3) of the Energy Charter Treaty of 17 December 1994, hereinafter: the ECT, was

the basis for such arbitration. The arbitral tribunal rendered an arbitral award on 19 December 2013, which was supplemented by an arbitral award dated 17 January 2014. In its award the arbitral tribunal ruled that Kazakhstan had violated its obligations under the ECT towards Stati c.s. and ordered Kazakhstan to pay Stati c.s. damages after deduction of debts,

USD 497,685,101. The included damage in respect of the LPG installation was set at an amount of USD 199 million. No appeal is possible against the arbitral awards.

2.4 Kazakhstan applied to the competent court in Stockholm (Svea Hovratt) for the arbitral awards to be set aside. This Swedish court rejected Kazakhstan's claim by order of 9 December 2016. Kazakhstan lodged an extraordinary appeal against the award of the Swedish court (seeking the setting aside of the arbitral awards for gross procedural error), which was rejected by the Swedish Supreme Court by judgment of 24 October 2017. No further appeal has been lodged against the award dismissing the application for setting aside'.

3. Further assessment

3.1 Reference is made to what has been considered and decided in the interim decision, the content of which is to be considered repeated and inserted here. This case concerns the request by Stati c.s. to recognise the arbitral awards and to authorise their enforcement.

3.2 The interim order gave Kazakhstan the opportunity to review the documents that became available to the High Court on 15 June 2018 as a result of the disclosure in the English proceedings and to submit a selection of those documents to the Court and explain them in writing. That order also gave Kazakhstan the opportunity to challenge the High Court's ruling, which was expected to be delivered before the end of 2019. It was also provided that Stati c.s. would be allowed to respond by way of a deed and that daama would be ordered to attend a further oral hearing.

3.3 Kazakhstan, by the record it has taken, has indicated that the English proceedings before the High Court have been withdrawn so that no final judgment can be given. Kazakhstan has also, by means of its instrument, further explained, on the basis of the newly obtained documents, its alleged deception of the arbitral proceedings. By its instrument it also repeated and supplemented its request under Article 843a of the Code of Civil Procedure. Stati c.s. contested this in their deed and the parties again explained their points of view orally.

3.4 The application by Stati c.s. for recognition and enforcement of arbitral awards is based on Article 1075 of the CR in connection with Articles III and IV of the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Treaty Series 1959, 58), further: the New York Convention. Kazakhstan has not contested the applicability of Article 1075 CR and the New York Convention. Now that the arbitral awards have been rendered in the Contracting State of Sweden, the Court will start from the applicability of the New York Convention and therefore also from the applicability of Article 1075 Rv and Article 1075 Rv. 1075 Rv. By way of defence, Kazakhstan argues that recognition and enforcement should be refused on grounds such as those set out in Article V of the New York Convention. It argues, first, that the arbitral awards were obtained by fraud and that recognition and enforcement of those awards would therefore be contrary to public policy within the meaning of Article V(2) of the New York Convention. Kazakhstan argues, secondly, that the grounds for refusal referred to in Article V, paragraph 1, letters a, b, c or d are present. The grounds for refusal put forward by Kazakhstan will be discussed and assessed.

Procedural deception

3.5 Kazakhstan argues that the arbitral awards were rendered by fraud on the part of Stati c.s. For the rejection of an application for recognition and authorisation for enforcement on that ground, it is not sufficient that after the award of the arbitral awards it has become apparent that statements made by Stati c.s. in the arbitral proceedings were (partially) incorrect or incomplete. In order to reach the threshold of the procedural deception set by Kazakhstan, it is necessary to go beyond the mere (partial) inaccuracy or incompleteness of those statements. It must concern facts or circumstances which have become apparent after the arbitration proceedings and which can be attributed to Stati c.s. and which are so serious that the arbitral awards should have no legal effect. This requires at least that Stati c.s. has deliberately misled the arbitral tribunal, while the actions of Stati c.s. must moreover have had a substantial influence on the formation of the arbitral awards.

3.6 When assessing the presence of this ground for refusal, it should be borne in mind that the assessment of the original dispute between the parties is reserved for the arbitral tribunal. The exequatur judge must refrain from reviewing the case pursuant to Article 1075(2) in conjunction with Article 985 of the Dutch Code of Civil Procedure, which is applicable in this case. It is also important to note that the Swedish nullification judge has already ruled on the question whether the arbitral awards were rendered by fraud and has answered this question in the negative. Although the Dutch exequatur Court should independently assess the presence of the ground for refusal and Kazakhstan has supplemented its statements regarding the deception in these proceedings in parts, the judgment of the Swedish Court of Destruction nevertheless gives a strong indication that there was no question of procedural deception.

3.7 It should also be noted that the judgment of the English High Court of 6 June 2017 (see recital 2.16 of the interim order) that prima facie fraud is involved is only a preliminary

opinion. By its nature, such a judgment is not binding on the assessment of the merits of the case.

Fraud regarding LPG installation costs

3.8 Kazakhstan argues that Stati c.s. made false statements in the arbitration proceedings and withheld information about the construction costs of the LPG installation. Stati c.s. have told the arbitral tribunal - contrary to the truth - that they have spent at least USD 245 million on the construction of the LPG installation. However, Stati c.s. have set up constructions to fraudulently increase the construction costs. First of all, Stati c.s. had Perkwood, of which they had concealed in the arbitration proceedings that it was a related party, charged a management fee of USD 43,852,108 to TNG without there being a contractual basis for this and without any services being provided. Secondly, another party related to Stati c.s., Azalia, purchased parts for USD 35 million and resold them to TNG via Perkwood for the artificially increased price of USD 93 million. Thirdly, as the Court understands it, Stati c.s. entered fictitious parts in their accounts for USD 31 million and fourthly, Stati c.s. made TNG pay USD 72 million for parts that were never delivered. Stati c.s. also fraudulently submitted to the arbitral tribunal that the bid of KMG (KazMunaiGaz) was a reliable indication of the value of the LPG installation. In 2008, Stati c.s. advised the potential buyers of the LPG installation, including KMG, that the construction costs of the installation at that time amounted to approximately USD 193 million, while they knew this was not true. If the arbitral tribunal had known that KMG's bid was based on costs fictitious through transactions with parties related to Stati c.s., it would never have regarded that bid as a reliable indication of the value of the LPG installation, according to Kazakhstan.

3.9 Stati c.s. fought it. There was no fictitious increase in the price of spare parts, nor any unjustified increase in the price of spare parts. The prices of parts were increased because costs were incurred for transport, insurance and services, because of a currency conversion from euros to dollars and because of a surcharge for management fees. These management fees were not charged without reason. Under this heading Perkwood did provide services to TNG for the construction of the LPG installation. The parts to the amount of USD 72 million have been delivered. According to documents from Kazakhstan, these parts were found at the LPG installation in 2010. Furthermore, Stati c.s. never concealed the fact that Perkwood was an affiliated party. In any case, there was no intention on her part to mislead the arbitral tribunal. Nor did the alleged deception have any influence on the content of the arbitral awards, Stati et al. conclude their defence. The Court of Appeal considers as follows.

3.10 It appears from the arbitral awards that the parties in the arbitral proceedings have extensively debated the valuation of the LPG installation and the compensation to be determined on the basis of that valuation. According to the arbitral awards, Stati c.s. took the position in those proceedings that the installation should be valued according to the expected Discount Cash Flow (DCF), which was set at USD 408.3 million by their expert, FD1. According to them, the scrap value was not an appropriate remuneration for the LPG plant taken into Kazakhstan's possession, which Kazakhstan wanted to put into operation at voile

capacity. In any case Stati c.s. wanted their investment costs to be compensated and, in addition, (part of) the value that they could have realised when they put the LPG plant into operation to process the 'Contract 302' gas. Stati c.s. estimated their investments up to July 2009 at USD 245 million and the expected value on commissioning for the 'Contract 302' gas at an amount of USD 329 million, so that the expected value on commissioning exceeded the costs by an amount of USD 84 million. Stati c.s. also pointed out that they could have sold the LPG installation to a third party that could have processed its own gas in the LPG installation. They pointed in that respect to KMG's indicative bid of USD 199 million in September 2008. Kazakhstan took the position in the arbitration proceedings that the LPG installation was a 'failed project' and that therefore Stati c.s. could not claim damages in respect of that installation, at most a possible scrap value, but that Stati c.s. had not submitted anything in this respect. According to Kazakhstan, Stati c.s. wrongly referred to the investment value or the book value because that is not a good indication of the market value. After all, a hypothetical buyer was not interested in the size of the investments but only in the expected returns. Kazakhstan referred to its expert Deloitte, who concluded that the plant had a negative value of USD 89,9 million. Deloitte assumed the DCF method and estimated that USD 100 million of expenditure would still be needed to complete the LPG installation. Kazakhstan also referred to reports by the expert GCA (Gaffney, Cline & Associates), which it hired, specifying that (at least) USD 100 million was still needed to complete the installation and put it into operation. Kazakhstan further pointed out that the bids made by KPM and others did not represent fair market value (FMV) because, according to witness statements, they were made only for strategic reasons, i.e. to gain access to the data room. Kazakhstan also disputed its intention to dismantle the LPG installation.

3.11 As a result of bet party debate, the arbitral tribunal considered that bet was not convinced by the conclusion of the experts of Kazakhstan that the LPG installation was a 'failed project'. After all, in that case Kazakhstan would not have been prepared to invest further in completing the construction, which was the case according to the documents. The arbitral tribunal further considered that it had taken note of the extensive arguments of the parties, based on their expert reports, but that it did not need to evaluate those reports and their very different outcomes. In the opinion of the arbitral tribunal, 'the relatively best source' for the valuation of the installation is the bids for that installation made by third parties around October 2008. After all, the potential buyers bid for the LPG installation in the expectation that it would become operational. The arbitral tribunal has thus chosen its own path in determining the value, apparently guided by the focus of both parties on the operational value of the LPG installation. The arbitral tribunal did not consider the arguments of the parties about that operational value, which were mainly focused on the outcome of the valuation by the experts of both parties. Instead, the Arbitral Tribunal chose the 2008 bids, in particular the bid by KMG, as the relatively best source for the valuation of the LPG installation, on the basis of the multitude of facts presented by the parties. With this choice, the Arbitral Tribunal showed that it attached decisive importance to the operational value of the LPG installation in economic terms. After all, that value is evident from the bids. The arbitral tribunal rejected the fact that the bids were only strategic and not a price the bidders were prepared to pay. This implies that the Arbitral

Tribunal did not attribute any significance to the costs invested in the LPG-installation in determining the damage. The debate of the parties in the arbitration proceedings partly concerned the question whether these investment costs should be significant for the valuation of the LPG installation. The Arbitral Tribunal made the choice not to base its decision on the investment costs, which was also advocated by Kazakhstan. The conclusion is that the position taken by Stati c.s. that it has invested USD 245 million in the LPG installation has not materially influenced the outcome of the arbitration proceedings.

3.12 Kazakhstan also argued in these proceedings that the investment costs (falsely) claimed by Stati c.s. via the bids indirectly influenced the outcome of the arbitral proceedings. To this end it argues that in the summer of 2008 Stati c.s. prepared a so-called information memorandum for the sale of (among others) TNG in which they stated that TNG had invested an amount of USD 193 million in the LPG installation until 1 July 2008. These costs had also been falsely increased in the manner described above, so that KMG's bid was obtained by fraud. After all, the text of the bid shows that it is partly based on the construction costs stated by Stati c.s.. If the arbitral tribunal had known this, it would never have considered KMG's bid to be the relatively best source of valuation, according to Kazakhstan. As a result of this argument, the Court of Appeal considers the following. In its considerations about the valuation of the LPG installation, the Arbitral Tribunal established that this installation was valued at an average amount of USD 150 million in the bids. Subsequently, the arbitral tribunal pointed out the special significance of KMG's bid, which is owned by Kazakhstan, to the amount of USD 199 million and set the damage to be compensated by Kazakhstan at this amount. In determining the damages, therefore, not only KMG's bid was taken into account, but the Arbitral Tribunal also considered the other bids. According to the explanations given by the bidders, these bids were either based on the DCF method or no valuation method was described. In addition, according to the accompanying text, KMG's bid was only partly based on the construction costs. The value of the LPG installation was calculated as the mathematical average of the value on the basis of the operational profit (EBITDA) and the value on the basis of the historical costs. The offer of USD 199 million is close and even slightly higher than the - according to Kazakhstan fraudulent - size of the stated construction costs of USD 193 million. KMG has therefore apparently estimated the value based on the operating profit to be equal to or higher than the construction costs. It is therefore not entirely clear that the statement of construction costs of USD 193 million had an influence on the amount of KMG's bid, let alone on the amount of the other bids. Furthermore, it is only speculative to assume that the arbitral tribunal, knowing that the construction costs were lower than predicted for the buyers, had not considered the bids to be the relatively best source for the valuation of the LPG installation, as Kazakhstan does. Even then, the arbitral tribunal could have assumed that the potential buyers, and KMG as a Kazakh state-owned enterprise in particular, were the best informed parties about the (operational) value of the LPG plant. In that respect it is important to note that the Arbitral Tribunal expressly rejected Kazakhstan's defence that only strategic bids to gain access to the data room - where the bidders could have controlled the investment costs - had been made. Moreover, it is by no means obvious that in the summer of 2008, even before there was a dispute between the parties, Stati c.s. deliberately set this up in order to be able to influence the arbitral proceedings

that were not yet pending. Kazakhstan has made no claim that would justify such a conclusion. On the other hand, Stati c.s. argued that although in the arbitral proceedings Stati c.s. referred to the bids, and to KMG's bid in particular, it did not take the position that the arbitral tribunal should regard those bids as leading in the determination of damages.

3.13 In the present assessment it is also important to note that Kazakhstan never contested in the arbitral proceedings that there were construction costs to the extent alleged by Stati et al. It merely took the view that the construction costs of USD 245 million put forward by Stati c.s. are irrelevant because the market value (FMV) of the LPG installation, which in its opinion was much lower than the construction costs because the LPG installation would never be profitable, should be taken into account. On the contrary, Kazakhstan invoked GCA's expert opinion in the arbitration proceedings. That expert's report states that an estimated investment of USD 320 million is reasonable 'for the plant as designed' and furthermore that at the time of the report the LPG plant was ready for 75 to 90 percent (and according to the statements of Kazakhstan even for 80 to 90 percent). The amount stated by Stati c.s. therefore does not materially deviate from the amount of reasonable costs mentioned by this expert on the part of Kazakhstan, taking into account the percentage mentioned by the expert that the installation would be ready (75 percent of 320 million therefore USD 240 million). Even if the completion costs of USD 100 million estimated by the expert are deducted, the investment amounts to USD 220 million, which is not substantially different from the construction costs claimed by Stati c.s. either. Against this background it cannot be seen that Stati c.s. has fraudulently misinformed the arbitral tribunal about the construction costs, let alone that the arbitral tribunal has been guided by them. If the arbitral tribunal had assumed the reasonable costs according to the expert report of Kazakhstan, it would have assumed a comparable amount of construction costs.

3.14 In this context, it is also significant that Kazakhstan was already in control of the LPG installation at the time of the arbitration proceedings and thus had an insight into the actual state of that installation. As it has not disputed, Kazakhstan also had the administration of TNG at that time. Kazakhstan therefore had every opportunity in the arbitration proceedings to take a substantiated standpoint on the costs already incurred for the LPG installation and in any event on the costs reasonably incurred. It also appears from the GCA report that GCA employees actually inspected the LPG installation so that nothing stood in the way of taking a substantiated standpoint on the costs reasonably incurred for the construction project.

3.15 It should also be borne in mind that there may be differences of opinion as to which costs can reasonably be attributed to the construction of the LPG installation. Positions taken in this respect cannot therefore be regarded as fraudulent if they subsequently turn out to be (partially) incorrect. In this case, however, in the arbitration proceedings there was no difference of opinion about the extent of the costs to be reasonably charged. This makes all the more reason why the statements Stati et al. made in this respect in the arbitration proceedings cannot easily be regarded as deceptive. It may be inferred from the specific allegations made by Kazakhstan in the present proceedings and from the documents submitted by Kazakhstan in connection therewith that TNG, the shares of which were owned by Stati c.s. at the time, made payments to

Perkwood and Azalia, other entities affiliated to Stati c.s., whereas there was no clear factual or legal basis for those payments. However, this does not mean that there has been a procedural fraud as advocated by Kazakhstan. That alone precludes the fact that it has not been established that the payments in question were made with the aim of fraudulently boosting the value of the LPG plant in the arbitration proceedings. In any event, this is not obvious for costs incurred and listed in the information memorandum provided to the bidders. After all, these costs were all incurred and processed in the administration of TNG before the dispute between the parties arose. In addition, it has not been sufficiently established that costs were deliberately included for parts that were not necessary or that were not supplied. In the present proceedings Stati c.s. have disputed, stating reasons, that parts have been fictitious or have not been delivered, while Kazakhstan has not put forward any circumstances in this respect either that point to deliberate actions of Stati c.s. in connection with the arbitral proceedings. That this could be regarded as fraudulent transactions, in the sense that Stati c.s. included costs which could not reasonably be attributed to the construction of the LPG plant, is also contradicted by the findings of Kazakhstan's expert, who does not substantially contest the total amount of investments put forward by Stati c.s.. The fact that, consciously or unconsciously, not or not correctly accounted for in the administration of the various entities affiliated to Stati c.s., as suggested by Kazakhstan, is of insufficient significance in this respect. The amounts allegedly fraudulently entered by Stati c.s. according to Kazakhstan add up to more than USD 200 million. This, too, raises questions about the deceptiveness invoked by Kazakhstan. After all, the amount of actual investment costs remaining after deduction of those allegedly fraudulent costs, not exceeding USD 45 million, does not correspond at all to the reality found by Kazakhstan's expert. This makes it all the less likely that costs have been fraudulently incurred.
3.16 In the light of the foregoing, it is also difficult to see how Stati and Azalia's silence regarding the link between them, on the one hand, and the entities Perkwood and Azalia, on the other, can be regarded as deception, as argued by Kazakhstan. Now it has not been established that payments made by TNG to these entities can be regarded as fraudulent, it is no longer relevant whether or not these parties were affiliated to Stati c.s. and, moreover, if Stati c.s.

disputes this, silence on the matter can no longer be regarded as procedural fraud. The Court of Appeal therefore further ignores the debate that the parties have had on this subject.

3.17 The foregoing means that, with regard to the valuation of the LPG installation, no facts or circumstances have come to light that are so serious that the arbitral awards should have no legal effect. It has not been established that Stati c.s. deliberately misled the Arbitral Tribunal with respect to that valuation, nor that the alleged deception had a material effect on the formation of the arbitral awards.

Misrepresentation of lack of liquidity

3.18 Kazakhstan also argued in its defence that the arbitral tribunal seems to attribute the liquidity shortfall of TNG and KPM to its (Kazachstans) actions, whereas this liquidity shortfall could very well have had its origin in the fictitious construction costs of the LPG installation

discussed above. According to Kazakhstan, this could have led the arbitral tribunal to a different opinion about the causality between its conduct and the damage alleged by Stati c.s.. The Court of Appeal does not agree with this argument, if only because it has not been sufficiently established that the construction costs were fictitious. The fact that the Arbitral Tribunal, in the case that the arbitral proceedings would have shown fictitious building costs, would have ruled differently about the causality between the conduct of Kazakhstan and the damage claimed by Stati c.s. is, in view of the multitude of facts that the Arbitral Tribunal involved in its judgment about this causality, nothing more than speculation.

3.19 In addition, Kazakhstan has argued in its note taken after the interim decision that during the examination of the new disputed documents it appeared that Stati c.s. 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 in June 2019 entailed that Tristan Oil would deliver bonds to Laren Holding (further: Laren), that Laren would transfer these bonds to lenders who would provide Laren with a loan of USD 60 million, of which amount the bonds would be paid and a loan of USD 30 million would be provided to TNG and KPM. The deception would consist in the fact that the documents currently obtained, i.e. minutes of Ascom's board meetings of 14 and 22 October 2008, an e-mail from Standard Bank dated 25 November 2008 and an internal e-mail dated 11 December 2008, show that Stati c.s. already had a liquidity deficit of USD 50 million in October 2008 with regard to their activities in Kazakhstan, expected a liquidity deficit in the first half of 2009 and sought financing, and that the first internal e-mail of 11 December 2008 now obtained shows that Stati c.s. considered the loan from Credit Suisse to be too expensive and too restrictive. It also appears from a currently obtained settlement agreement that Laren was a party related to Stati c.s. and from newly obtained e-mail correspondence between Fitch Ratings and Stati c.s. it follows that (partly) the actions of Stati c.s. caused Fitch Ratings to downgrade the credit rating of the bonds issued by Tristan Oil.
Finally, newly obtained documents show that Stati c.s. was actively involved in the negotiations of the Laren transaction and successfully negotiated favourable conditions for itself, while in the arbitration proceedings they argued that they had to enter into the Laren transaction under very unfavourable conditions.

According to Kazakhstan, if the newly obtained documents had been known to the arbitral tribunal, it would have ruled differently on the causality between its conduct and the damage alleged by Stati et al.

3.20 Stati c.s. responded as follows by deed. They never claimed in the arbitration proceedings that the liquidity problems at the end of 2008 were due to Kazakhstan's actions, nor that Kazakhstan's actions were the only source of their liquidity problems. The documents now referred to by Kazakhstan were therefore also not relevant to the dispute in the arbitral proceedings. Moreover, Stati c.s. submitted and explained the term sheet of 5 December 2008 with the conditions Credit Suisse set for the loan in the arbitral proceedings so that Kazakhstan (and as the Court understands: also the arbitrators) could assess the conditions for the loan

itself. Stati c.s. also explained why E. Kasumov, who indeed acted for them, also signed the settlement agreement on behalf of Laren in December 2011. Therefore, according to Stati c.s., the settlement agreement did not prove that Laren was an affiliated party. Stati c.s. further argued that in the arbitral proceedings they submitted Fitch's substantiation of the credit assessment which reflected the same points as in the e-mail correspondence referred to by Kazakhstan. There was therefore no reason to challenge this correspondence in the arbitral proceedings. Finally, Stati c.s. point out that they submitted the final documents relating to the Laren transaction to the arbitral proceedings. They therefore did not withhold any agreed conditions. Stati c.s. also explained that at the time of the arbitral proceedings they no longer benefited from the favourable conditions referred to by Kazakhstan because they had defaulted on the loan and these conditions had therefore lapsed.

3.21 Kazakhstan has not reacted any more to the facts mentioned by Stati c.s. in its above mentioned argument during the (under 1) continued oral hearing, so that the Court of Appeal considers these facts to be established. The Court of Appeal also follows Stati c.s. in the related conclusion that the documents currently mentioned by Kazakhstan were not relevant in the arbitral proceedings, or at least that Stati c.s. could reasonably believe this. It also follows from these facts that Stati c.s. in the arbitral proceedings always brought into the proceedings the documents most relevant for the assessment of the dispute. It has not appeared that it deliberately withheld documents in order to harm Kazakhstan's position. The absence of the documents referred to by Kazakhstan cannot, therefore, be regarded as serious enough to constitute a procedural fraud.

3.22 On top of that. Stati c.s. rightly pointed out that, as the arbitral tribunal considered in the arbitration award under 349, Credit Suisse informed Stati c.s. on 18 December 2008 in response to a press release from INTERFAX that it would not grant a loan until Stati c.s. had settled their dispute with Kazakhstan. In recital 994 of that judgment the arbitral tribunal concludes that it is obvious and not disputed by Kazakhstan that this press release has been published by or as a result of the actions of Kazakhstan. Subsequently, in consideration 1416, the arbitrators explain that 'aggressive and forced actions, including the inspectons, the criminal charges, and the asset seizures' by Kazakhstan forced Stati et al. to accept the 'horrendous' conditions of the Laren transaction. Under 1618, the arbitrators further consider that, following an evaluation of 'the timeline of events', they conclude that Kazakhstan's actions, which had already been found to violate the ECT, including the liquidity shortfall to the extent it was also caused by Kazakhstan, forced Stati c.s. to reduce their efforts to develop the Borankol and the Tolkyn fields. In the light of these considerations, Kazakhstan has failed to explain in a wholly inadequate manner that the documents referred to by it could be of material significance for the arbitral tribunal's assessment of the causality between Kazakhstan's actions and the damage suffered by Stati et al. After all, those documents do not relate to the substance of the actions imputed to Kazakhstan which, in the opinion of the arbitral tribunal, led to that damage.

3.23 The conclusion of this is that no procedural deception can be established with regard to the liquidity shortfall either.

Deception other

3.24 Kazakhstan seems to assume (defence under 95) that the decision of the arbitral tribunal to award an amount of USD 31 million in investment costs as damages in respect of 'Contract 302 Properties' was made by fraud. According to Kazakhstan, these were costs that were coveted in TNG's annual reports.
Kazakhstan, however, has not worked this out in concrete terms, so that the court ignores its position.

Other grounds for refusal

3.25 Finally, Kazakhstan argued that recognition and enforcement should be refused on the ground that (a) the composition of the arbitral tribunal was not in accordance with the applicable rules (Article V(1)(d) of the New York Convention or at least Article 1076(1)(a)(b) of the Code), (b) it has not been duly notified of the appointment of the arbitrator appointed for it (Article V.1(b) of the New York Convention) and (c) there was no valid agreement of arbitration or is contrary to the conditions under which arbitration is provided for (Article V.1(a) and (c) of the New York Convention or at least Article 1076(1)(A)(a) of the Code). According to Kazakhstan, the grounds constitute grounds for refusal of Stati c.s.'s request, either on their own or in combination.

3.26 Kazakhstan points out the following with regard to land (a). Article 13 of the Stockholm Chamber of Commerce Arbitration Rules 2010 (hereinafter the SCC Rules) applicable to arbitration provides that in the event that a party fails to appoint an arbitrator within the stipulated time period, the board of the SCC shall do so. The board of the SCC has thus appointed the arbitrator Lebedev without having the authority to do so. Kazakhstan argues that the board did not set a time period within which it had to appoint an arbitrator.

3.27 The course of events, as also outlined by Kazakhstan, has been as follows. By letter dated 5 August 2010, received on 9 August 2010, the SCC secretariat forwarded to Kazakhstan the request for arbitration on the part of Stati c.s. and requested a reply in accordance with Article 5 of the SCC Rules no later than 26 August 2010. The Secretariat then sent a reminder to Kazakhstan by letter dated 27 August 2010, received on 31 August 2010, and extended the deadline for submitting a reply until 10 September 2010. It was established that Kazakhstan had not replied within the deadlines set by SCC. Kazakhstan raised the question of whether there was a time limit referred to in Article 13 of the SCC Rules. The Court answers this question in the affirmative. Article 5 of the SCC Rules, to which the letter of the SCC of 5 August 2010 explicitly refers, stipulates that the answer will contain the name and further details of the arbitrator appointed by the defendant. Therefore, contrary to Kazakhstan's contention, the time limit set for Kazakhstan to submit a response should also be considered as the time limit within which it had to appoint an arbitrator as the defendant. The situation that a party, Kazakhstan,

did not appoint an arbitrator within the time limit set for it therefore occurred. The Board of the SCC was therefore entitled, after the expiry of the time limit set, to appoint an arbitrator itself, as it did in the person of Lebedev on 15 September 2010.

3.28 The foregoing is not altered by the fact that on 13 September 2010 Stati c.s. requested the board of the SCC to appoint an arbitrator on behalf of Kazakhstan and that Kazakhstan, because it only became aware of that request on 23 September 2010, was not able to respond to that request before the appointment of Lebedev. Indeed, the Board of SCC was already empowered under Article 13 of the SCC Rules to appoint an arbitrator as soon as the time limit set for Kazakhstan to appoint an arbitrator had expired. It must be held that the Board of SCC has proceeded to appoint an arbitrator due to the lack of a response from Kazakhstan and not as a result of the request to do so by Stati c.s. That request is in any case not the basis of the Board's authority to make that appointment and is therefore, as well as the impossibility of a timely response to that request on the part of Kazakhstan, of no significance in this respect.

3.29 Nor does the course of events outlined above lead to the conclusion, as Kazakhstan advocates, that she was not properly informed of Lebedev's appointment. Indeed, Kazakhstan received a notification of the SCC concerning the appointment on 27 September 2010 and thus shortly after the appointment. It is not clear why this would be too late or not proper. The fact that Kazakhstan has not been able to respond to the request of Stati c.s. does not make this any different.

3.30 Nor is it significant in this case that the SCC Regulations stipulate that the nature and circumstances of the dispute must be taken into account. According to Kazakhstan, the board of the SCC should have taken into account that decision-making within a government is somewhat slow, that it had to translate the documents and that it had not yet appointed a lawyer for the arbitration procedure. The Court ignores this because in principle these circumstances should be at the expense and risk of Kazakhstan as a professional party. Moreover, if Kazakhstan considered the time limits set to be too short to submit a complete answer, with an indication of the arbitrator appointed by her, she could have requested a postponement for the submission of a (complete) answer. She did not do so, not even immediately after she became aware of Lebedev's appointment on 27 September 2010. Kazakhstan responded for the first time to the letters and documents sent to her by letter from her lawyer dated 8 November 2010, in which letter the only request was for the file to be sent. It was only on 2 December 2010 that she objected to Lebedev's appointment. In this state of affairs, there are no circumstances that would have prevented the SCC Kazakhstan from keeping to the deadlines set for it in all reasonableness.

3.31 Kazakhstan also invokes that Stati c.s. did not respect the three-month cooling-off period of Article 26(2) ECT. The arbitral tribunal would therefore not have had jurisdiction to hear the dispute, according to Kazakhstan. Stati c.s. dispute that the cooling-off period has not been observed. Whatever else, the failure to observe the cooling-off period does not result in the arbitral tribunal's lack of jurisdiction. The text of the ECT does not give sufficient grounds for

such a far-reaching conclusion. On the contrary, according to paragraph 3 of the aforementioned Article, Kazakhstan has unconditionally agreed to submit disputes to international arbitration.

Therefore, Kazakhstan's conclusion that there is no valid arbitration agreement or that there is a conflict with the conditions under which arbitration is provided for is not followed.

3.32 Moreover, Kazakhstan has not contested the fact that Stati c.s. pointed out to it at various points in time prior to the arbitration that points of contention had arisen between the parties. Nor did it contest the suspension of the arbitration proceedings in order to comply with the requirement of the cooling-off period. In the light of these circumstances, which it did not dispute, Kazakhstan did not explain that and in what way it was disadvantaged by the course of events. In so far as it argues that the observance of a cooling-off period would have given her sufficient time to prepare for the appointment of an arbitrator, the Court once again points out that Kazakhstan has failed to request an extension of the period set for this purpose. Moreover, the purpose of the cooling-off period is not to give the parties time to prepare for an arbitral procedure, but rather to prevent it by creating time for reaching an amicable settlement. In this case, that objective is served by other means.

3.33 Seen in conjunction with the circumstances discussed above, there is also no reason to reject the present application.

Breach of the duty of truth

3.34 In its deed following an interim order, Kazakhstan also argued that in the present proceedings before the Court of Appeal Stati c.s. had acted in violation of the duty of truth as laid down in Article 21 of the Rv. During the first oral hearing Stati c.s. allegedly took statements that are incompatible with documents from their own administration. The application for recognition and enforcement should also be refused on that ground. Stati c.s. dispute that they have violated Article 21 Rv and argue that violation also does not constitute a separate ground for refusal.

3.35 The Court of Appeal considers that the grounds for refusal of an application such as the present one are exhaustive in the New York Convention. This does not include the violation of Article 21 Rv. Kazakhstan's argument should therefore be disregarded. Moreover, Kazakhstan's arguments concerning that infringement concern the same matter as the alleged deception of Stati c.s. in the arbitral proceedings. The court of appeal has already ruled on this matter in the foregoing.

Request pursuant to Article 843a of the Code of Conduct

3.36 Kazakhstan has indicated in its deed following an interim decision

that it maintains its request for copies of documents made to the Court by letter of 15 May 2018 with regard to the following documents:

- agreements relating to the management fee paid to Perkwood and documents evidencing services in return for that fee, and
- agreements between Azalea and Perkwood relating to the construction of the LPG plant, including the purchase and supply of specifically designated parts.

3.37 Partly in the light of what has been considered above with regard to the fraud alleged by Kazakhstan with regard to the costs of the LPG installation, and more specifically with regard to the costs stated with regard to the management fee and the parts supplied, it is not possible to see what legitimate interest Kazakhstan currently has in inspecting the said documents. In any event, Kazakhstan has not indicated a sufficiently specific interest in this respect in the light of these considerations.

3.38 The same applies to Kazakhstan's additional request for access to the agreements between Azalea and Hayden, including the agreements 'for drilling equipment' and 'for LPG equipment'. In the light of what has already been considered, Kazakhstan has not specifically indicated its interest in these documents either.

3.39 Kazakhstan also requests at least access to all documents not produced in the English proceedings. To this end, it submits the following. Stati c.s. have informed the English High Court that they have identified a total of 130,000 documents eligible for production (disclosure). Of these, they produced only 70,000 pieces. For the rest, they refused to comply properly with the disclosure order. After all, Stati c.s. refused to submit half of the documents on dubious grounds; the remaining documents would probably be privileged or irrelevant. Stati c.s. then terminated the English recognition procedure before it had decided on the application for leave for enforcement. The Court of Appeal considered that this does not give sufficient reason to demand Stati c.s. to hand over or inspect the documents in the Dutch proceedings at issue. Kazakhstan should have explained its legitimate interest as referred to in Section 843a of the Rv in a concrete manner to this end. It did not do so properly, or at least not in a sufficiently specific manner, so that there is no grand for granting its application.

3.40 Kazakhstan also points to a 'specific disclosure' in the English procedure that Stati c.s. would not have complied with. The documents could shed light on the fictitious price increase of parts supplied by Kazakhstan. Also with regard to these documents, Kazakhstan did not provide sufficiently concrete explanations in view of its overriding interest.

Conclusion

3.41 Now that no grand has been received for its refusal, Stati c.s.'s request against Kazakhstan will be granted. The request of Kazakhstan pursuant to article 843 of the Code of Civil Procedure will be rejected. Kazakhstan will be ordered to pay Stati c.s.'s legal costs as the

unsuccessful party. This means at the same time that the request of Kazakhstan to order Stati co.s. to pay the actual costs of the proceedings is, in the absence of a sound basis, not allowable. In the interim decision it has already been considered - on the grounds stated therein - that the application will be rejected insofar as it is directed against National Fund and Samruk. Stati c.s. will, as the unsuccessful party, be ordered to pay the costs of the proceedings on the part of Samruk and National Fund.

3. Decision

The court:

recognises and grants leave for enforcement in the Netherlands of arbitral awards made between the parties on 19 December 2013 and on 17 January 2014 in Stockholm, Sweden;

dismisses Kazakhstan's request pursuant to Article 843a of the Code of Conduct;

rejects the request of Stati c.s. insofar as it is directed against Samruk;

rejects Stati's request insofar as it is directed against National Fund.

condemns Kazakhstan to pay the costs of these proceedings on the part of Stati c.s. and estimates these costs to date at € 716,- in out-of-pocket expenses and 6 3.222,- in salary;

orders Stati c.s. to pay the costs of these proceedings on the part of Samruk and estimates these costs to date at 6,726.00 in out-of-pocket expenses and € 3,222.00 in salary;

orders Stati c.s. to pay the costs of these proceedings on the part of National Fund and estimates these costs to date at € 726,- in out-of-pocket expenses and € 3.222,- in salary;

This order was issued by Mrs D. Kingma, W.H.F.M. Cortenraad and A.M.A. Verscheure and publicly pronounced by the role counsellor on 14 July 2020.

Mr. A.R. Steerhead