I, Annemarie Onsman, sworn translator for the English language at the Courts of Breda, the Netherlands, registered in the Wbtv register under number 1564, do solemnly and sincerely declare that the attached English text is a full, true and faithful translation made by me of the Dutch document hereunto annexed, submitted to me for translation, in testimony whereof I have hereunto set my hand, in Breda, the Netherlands, on this fifteenth of November, two thousand and eighteen.

A. Onsman

decision

AMSTERDAM COURT OF APPEAL

civil and tax law section, team I

case reference : 200.224.067/01

decision of the three-judge division for civil matters dated 6 November 2018

in the matter of:

1. Anatoli STATI,
residing in Chisinau, Moldavia,
2. Gabriel STATI,
residing in Chisinau, Moldavia,
3. **ASCOM GROUP S.A.,**
with its registered office in Chisinau, Moldavia, and
4. **TERRA RAF TRANS TRAIDING LTD.,**
with its registered office in Gibraltar,
applicants,
counsel: Mr G.J. Meijer of Amsterdam,

and

1. REPUBLIC OF KAZAKHSTAN
with its seat in Astana, Kazakhstan,
which also includes:
REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),with its seat in Astana, Kazakhstan,
counsel: M.A. Leijten of Amsterdam, and
2. **SAMRUK-KAZYNA JSC,**
with its seat in Astana, Kazakhstan,
counsel: Mr J. van den Brande of Rotterdam,
respondents,

1. Course of the proceedings

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

In an application with exhibits received by the Registrar of the Court of Appeal on 26 September 2017, Stati et al applied for recognition and leave for enforcement, on foot of Article 1075 DCCP in conjunction with Articles III and IV of the New York Convention 1958, or alternatively Article 1076 DCCP, of the arbitral awards given between the parties on 19 December 2013 and 17 January 2014 in Stockholm, Sweden (hereinafter the 'arbitral awards'), with an order against Kazakhstan for the costs of this action.

In a letter dated 15 May 2018, Kazakhstan applied for a stay of the oral hearing of the application, in which context it also made a number of "related" requests. In a letter dated 21 May 2018, Samruk also applied for a stay and made a number of other requests. In a letter dated 13 June 2018, the Court of Appeal informed the parties that the applications for a stay were denied and announced at the same time that there was no cause to decide on the other requests prior to the oral hearing.

On 15 June 2018, the Registrar of the Court of Appeal received a statement of defence with exhibits from Samruk. Samruk requested the Court of Appeal to declare its lack of jurisdiction insofar as the application is directed against it, or alternatively to rule that the applicants lack cause of action for their application, or alternatively to dismiss the application, with a (provisionally enforceable) order against the applicants for the costs of the proceedings.

Subsequently, on 18 June 2018, the Registrar of the Court of Appeal received a statement of defence with exhibits from Kazakhstan. Kazakhstan requested the Court of Appeal to declare its lack of jurisdiction to hear the case and refer the case to the judge in interlocutory proceedings at the Court of Amsterdam, with a (provisionally enforceable) order against Stati et al to pay the costs of the proceedings, or alternatively to order a stay of the proceedings, or alternatively to grant its Article 843 application, with a (provisionally enforceable) order against Stati et al to pay the costs of the Article 843a DCCP proceedings, or alternatively to determine that it may brief the Court of Appeal on the documents produced four days earlier relating to the issue of fraud (known to the parties), or alternatively to dismiss Stati et al's application.

Also on 18 June 2018, the Registrar of the Court of Appeal received a statement of defence with exhibits from the National Bank of Kazakhstan, which has its registered seat in Almaty, Kazakhstan and is represented by Mr A. K. Zirar, lawyer in Amsterdam (hereinafter the 'National Bank'), stating its wish to appear in the proceedings as an interested party. It asked the Court of Appeal to declare its lack of jurisdiction to hear the application against the National Fund, or alternatively to declare that the applicants lack cause of action for their application against the National Fund, or alternatively to dismiss their application against the National Fund, or alternatively to declare its lack of jurisdiction to hear the application in line with Kazakhstan's defence, or alternatively to declare that the applicants lack cause of action for their application, or alternatively to dismiss the application.

Kazakhstan submitted further exhibits, received by the Registrar of the Court of Appeal on 19 June 2018 (Exhibit 36), and on 21 June 2018 (Exhibits 37 and 38).

Stati et al also submitted further exhibits (39 through 45, Exhibit 45 is a USB stick), received on 21 June 2018.

The oral hearing of the application took place on 22 June 2018. On that occasion, the aforesaid Mr Meijer and Ms M. van de Hel-Koedoot, lawyer in Amsterdam, appeared for Stati et al; Mr M.A. Leijten and A.W.P. Marsman, both lawyers in Amsterdam, appeared for Kazakhstan; the aforesaid Mr Zirar appeared for National Bank; and the aforesaid Mr van den Brande and Mr H.F. van Druten, lawyer of Amsterdam, appeared for Samruk. They all provided explanations of their respective applications or statement of defence on the basis of pleading notes that were submitted to the Court of Appeal. Also appearing for Stati et al was E. Dzhazoijan, lawyer with King & Spalding; for Kazakhstan, A. Madaliyen and for Samruk, M. Mukhametzhano, legal expert.

Subsequently the pronouncement of the judgment was fixed.

2. Assessment

Jurisdiction

2.1 Kazakhstan and Samruk asked the Court of Appeal to declare its lack of jurisdiction to hear the application. The National Bank followed this defence. Kazakhstan and Samruk take the view that the transitional arrangement of Article IV of the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Civil Code and the Fourth Book of the Code of Civil Procedure in connection with the modernisation of Arbitration Law (hereinafter 'Arbitration Law (Modernisation) Act) also applies to foreign arbitration procedures and that under the transition law the old arbitration law must be applied to this application. Any other interpretation of this transition law would lead to the applicability of a different, possibly contradictory, procedural law in this case. Under that other interpretation, according to Samruk, a foreign arbitral decision would also be rendered subject to substantially more onerous conditions than a Dutch arbitral award, which is in breach of Article III of the New York Convention. To counter this, Stati et al argue that the transition law applies only to Dutch arbitral proceedings and decisions. They point out that according to Article 1075 DCCP, or alternatively to Article 1076 DCCP as it was worded after 1 January 2015, the Court of Appeal has jurisdiction to hear an application for recognition and leave for enforcement of a foreign arbitral award.

2.2 In regard to the question of its jurisdiction to hear the case, the Court of Appeal considers as follows. The main rule is that the consideration of an application is subject to the procedural law that is applicable at the time the application is submitted. Since this application was submitted on 26 September 2017, it is subject to the new arbitration law by virtue of that main rule. The Court of Appeal must determine whether the old arbitration law must nevertheless be applied, pursuant to the transition law as it is set out in the Arbitration Law (Modernisation) Act, to an application for the recognition and enforcement of a foreign arbitral award that was given prior to the entry into force of the new arbitration law (and that being the case it must be presumed that the arbitration was already underway before the entry into force, with effect from 1 January 2015).

2.3 In essence, Article IV (2) of the relevant law provides that the old arbitration law continues to apply to arbitration proceedings which were ongoing prior to the date on which the law entered into force. According to the explanatory memorandum on this paragraph of the article (Second Chamber, session year 2012-2013, 33611, no. 3, p. 45), this rule seeks to prevent the applicability of two different sorts of arbitral procedural law to a single arbitral process. The legislator has expressed this by providing that the old law "remains" applicable. The Court of Appeal infers from the legislative text and the explanatory memorandum that this rule was not written for foreign arbitration proceedings that were already underway upon the entry into force of the Arbitration Law (Modernisation) Act. These arbitration proceedings were not subject to the old (Dutch) arbitration law, so that this law cannot "remain" applicable on the basis of non-retroactive effect and consequently the problem of applicability of two different sorts of (Dutch) arbitral procedural law to the same legal process does not arise.

2.4 Article IV (4) of the Arbitration Law (Modernisation) Act further provides (insofar as it is relevant) that the law does not apply to cases brought before the court by the submission of an initiating application if and insofar as they are arbitration procedures as provided for in the second paragraph. Those cases continue to be subject, according to the fourth paragraph, to the old law. This arrangement, which according to the explanatory memorandum builds on paragraph 2, ensures, according to that same memorandum, that in arbitration proceedings that remain subject to the old procedural law, the tribunal and the judicial court do not apply a different, possibly contradictory, procedural law. For the reasons stated in ground 2.3, the Court of Appeal assumes that this rule of transition law was also not written for foreign arbitration proceedings.

2.5 The conclusion is that Article IV of the Arbitration Law (Modernisation) Act does not give cause to derogate from the main rule represented in 2.2 above that the current procedural law applies. This means that under Article 1075 (2) DCCP or Article 1076 (6) DCCP, the Court of Appeal has jurisdiction to hear this application. The Court of Appeal will therefore assume jurisdiction.

2.6 The submissions from Kazakhstan and Samruk do not alter the foregoing. Kazakhstan notes that the current Article 1076 (4) DCCP stipulates new requirements for what must happen within the arbitration proceedings. There is the addition that an application for recognition and enforcement under the current law is only refused – insofar as it is relevant – if the party which relies on this has claimed in a *timely manner* in the arbitration proceedings that the arbitrators have exceeded their mandate and if the failure to respect the mandate is *serious* in nature. Neither the arbitrators nor the parties were able to account for this amendment in procedural law, according to Kazakhstan. The Court of Appeal considers that the amendments to Article 1076 (4) DCCP described by Kazakhstan are subordinate in nature and moreover are not under consideration in a case such as this, in which the New York Convention applies. Furthermore, it is doubtful whether arbitrators or the parties in foreign arbitration proceedings do actually have regard to Dutch procedural law on arbitration. This provides in any event not sufficient grounds to presume that the Dutch legislator intended that the old law concerning the recognition and enforcement of arbitral awards must also remain applicable to foreign arbitration proceedings that were commenced before 1 January 2015. Kazakhstan also points out that Article 1074d DCCP currently impedes access to the judicial court in relation to applications for provisional measures. The Court of Appeal considers that the new wording of Article 1074d DCCP impedes access to the Dutch court in relation to taking provisional measures only where a decision on such a measure cannot be obtained in the arbitration. This must be assessed on a case-by-case basis and again does not provide sufficient grounds for a different interpretation of the transition law.

2.7 Samruk has pointed out that under the interpretation of the transition law as advocated by Stati et al, an application for the recognition and enforcement of a foreign arbitral award would be subject only to proceedings in a single fact-finding instance, whereas under both the old law (applicable before 1 January 2015) and the current law an application for enforcement of a Dutch arbitral award can be subject to two fact-finding instances. From the perspective of legal protection, a distinction is thus drawn between Dutch and foreign arbitral awards, according to Samruk. In the opinion of the Court of Appeal, this does not warrant a different interpretation of the transition law either. It would only mean that the distinction described by Samruk would not be made for awards given in foreign arbitration proceedings that were underway before 1 January 2015; this distinction would still apply, however, for foreign arbitration proceedings opened after that date. Hence that different interpretation offers no (permanent) solution for the conflict assumed by Samruk with Article III of the New York Convention. Moreover, it cannot be stated definitively that there is a conflict with Article III. Whilst it is true that an applicant seeking the recognition and enforcement of a foreign arbitral award can only put the application before one fact-finding instance, whereas a second fact-finding instance is available if a similar application concerning a Dutch arbitral award is refused, the Court of Appeal does not consider that to be a substantially more onerous condition as provided for in Article III of the New York Convention. The arguments put forward by Samruk do not change the finding either.

2.8 The Court of Appeal will order *ex officio* that this interim decision is open to appeal to the Supreme Court. The parties can therefore, if they so wish, put the matter of law concerning the jurisdiction of the Court of Appeal to the Supreme Court for consideration.

Samruk

2.9 Samruk also takes the position in its statement of defence that the application against it must be dismissed, or alternatively that the Court of Appeal must declare its lack of jurisdiction in relation to that application because an exequatur procedure cannot be used to obtain an enforcement order against a legal person that was not involved in the arbitration. Stati et al have acknowledged that Samruk is an independent legal person and is not a part of Kazakhstan. In contrast to what Stati et al apparently believe, a finding cannot be given in an exequatur procedure on the possible identification of Samruk with Kazakhstan and furthermore, Samruk disputes that that is the case. Samruk further contends that there are grounds to refuse the application: there is no arbitration agreement with Samruk, Samruk was not informed of the appointment of arbitrators and there is an evident violation of the principle of adversarial process and by extension a conflict with public policy.

2.10 Stati et al submit that Kazakhstan is abusing the legal independence of Samruk. Kazakhstan transfers part of its assets to Samruk, is shareholder of Samruk when the disposal of these shares is prohibited by law, and its government manages Samruk directly. This undermines the effectiveness of international investment protection under the Energy Charter, the basis of these arbitration proceedings, because enforcement is impeded. This case is consequently the right place for the debate, according to Stati et al.

2.11 The Court of Appeal considers as follows. Stati et al have not disputed that Samruk is an independent legal person, that it was not a party to the arbitration agreement, and that Samruk was also not a party in the arbitration proceedings and these aspects are therefore established between the parties. It is also established, in light of the preamble and the further content of the arbitral awards, that the awards were not made against Samruk, but only against Kazakhstan. The fact that Samruk was not a party to the arbitration agreement means that Article II of the New York Convention does not provide grounds to allow the application for recognition of the arbitral awards against Samruk. Furthermore, Article IV (1) (b) of this Convention precludes granting the application for recognition and enforcement. Samruk was not notified of the appointment of the arbitrators or of the arbitration proceedings and for that reason alone it was impossible for Samruk to defend its case. It is thus a given that granting the application against Samruk would be contrary to public policy. It therefore cannot be granted against Samruk by reason of the New York Convention.

2.12 The only substantive question under consideration in this action is whether Stati et al may enforce the arbitral awards in the Netherlands. The only party involved in answering that question is Stati et al's opposing party in the arbitration proceedings, Kazakhstan. The question of whether Stati et al is permitted, after leave for enforcement is granted, to enforce against assets belonging to Samruk concerns the method of enforcement and is consequently outside the scope of the present application. The Court of Appeal will therefore not get to assessing Stati et al's submission that Samruk must be assimilated with Kazakhstan. The application will be dismissed insofar as it is directed against Samruk.

National Fund

2.13 The National Bank submits that the National Fund is not a legal entity but a collection of assets that was "placed" with it in trust management. Therefore Stati et al cannot enforce against the assets of the National Fund because, they contend, the assets belong to the National Bank. The National Bank also raises the point that the National Fund is not a party in the arbitral awards. To counter this, Stati et al argues that although the National Fund does not have legal personality, Kazakhstan did temporarily authorise the National Bank to manage the assets in question and that Kazakhstan has argued in previous proceedings that the National Fund is segregated capital which creditors of Kazakhstan cannot enforce against. Stati et al consider it important for a decision to be given that these assets do indeed fall under the scope of any enforcement order that is granted.

2.14 Once again, the Court of Appeal considers that the matter at issue in this case is whether Stati et al may enforce the arbitral awards in the jurisdiction of the Netherlands and not the method of enforcement, which includes the question of which assets Stati et al may be permitted to enforce against. The application against the National Fund will also be dismissed since it is without grounds. The National Fund is not a party either to the arbitration agreement or to the arbitral award.

Stay

2.15 Kazakhstan's defence against allowing the application is essentially as follows. Stati et al committed fraud in the arbitration proceedings. The construction costs of the LPG installation discussed in those proceedings were fictitious and Stati et al claimed compensation for those fictitious costs in the arbitration. To that end, Stati et al suppressed the fact that Perkwood Investment Limited was a company affiliated to them. The said company charged a management fee of USD 44 million without reason and purchased parts which it sold on for three times the purchase price. Stati et al also included USD 72 million paid for unnecessary parts. When establishing the damage the tribunal took a bid by KMG as its starting point, despite the fact that KMG needed to rely on the accuracy of the erroneous financial information provided by Stati et al when it made that bid. The (final) arbitral award is therefore based on fraud. This is also an evident violation of public policy by international standards, again according to Kazakhstan. Stati et al dispute that there was any fraud, or alternatively that the awards made by the tribunal are based on fraud.

2.16 In connection with its defence, Kazakhstan refers to decisions given by the English High Court in a parallel application in London for enforcement of the same arbitral awards. In an interim decision on 6 June 2017, the High Court considered that there was a '*prima facie* case of fraud' which was of essential importance for the arbitrators. In the same judgment, the High Court considered that no court, including the Swedish court (in setting aside proceedings) had decided on the question of the (currently) alleged fraud. The case was then referred to a hearing at the end of October/beginning of November 2018 for further consideration of the *prima facie* case of fraud. In a decision on 11 May 2018, the High Court expressed the expectation that a decision can be taken on the matter of fraud in 2018, according to Kazakhstan. Kazakhstan also points out that following the disclosure by Stati et al in the English proceedings on 14 May 2018, it gained access to 5,600 pages of documents relating to the fraud and to a further 70,000 documents on 15 June 2018, shortly before the hearing on this application. Naturally, still according to Kazakhstan, it has been unable to conduct a full analysis of the latter documents.

2.17 In connection with the developments in the English proceedings as outlined above, Kazakhstan made a request in a letter dated 15 May 2018 principally for a stay of consideration of this application until after the (final) decision of the High Court, or alternatively until after the hearing planned by the High Court. Alternatively, it requested in the same letter that Stati et al be ordered, in application of Article 843a DCCP, to produce the further documents indicated in that letter. At the hearing, it moved that the Court of Appeal should first decide on its application pursuant to Article 843a DCCP, which currently relates solely to (a) documentation concerning the basis for the management fee of USD 43 million and (b) the annexes to the Azalea agreement. According to Kazakhstan it has not yet found those documents amongst those already produced. Following the production of the aforesaid documents, Kazakhstan wishes to have an opportunity to submit an additional statement of defence, in which it can also incorporate an analysis of the 70,000 documents, and a new oral hearing at which the Court of Appeal can examine the decision of the High Court that is expected before the end of this year. Kazakhstan has also asked the Court of Appeal to consider the appointment of an expert (forensic) accountant to investigate the alleged fraud and the relevant parts of the records of the various companies involved. Lastly, Kazakhstan has pointed out that Stati et al have no legitimate interest in a rushed enforcement.

2.18 Stati et al have argued that there is no basis either in Dutch procedural law or in the New York Convention for Kazakhstan's application for a stay. It follows from Article VI of this Convention that a decision on the application for enforcement can be suspended only if an application has been made to set aside the arbitration in the country in which the award was made. This means that one enforcement court cannot be deemed to await the other enforcement court. Stati et al contend that the foregoing also applies to Kazakhstan's application pursuant to Article 843a DCCP.

2.19 The Court of Appeal finds as follows. Kazakhstan is correct to point out that Stati et al waited for a considerable amount of time since the arbitral awards were rendered, over three and a half years, before submitting its application for recognition and enforcement in the Netherlands. Nor is it incorrect that Stati et al applied for a postponement for the production of documents in the English proceedings, and that they produced a large number of documents only shortly before the hearing of the present application. Therefore the fact that Kazakhstan has been unable to adequately study those documents before this hearing is also for the account of Stati et al. Under these circumstances it would seem appropriate, having considered the mutual interests, to stay further consideration of the application for a while. Kazakhstan must in any event have the opportunity to study the documents made available on 15 June 2018 and to submit a selection of them to the Court of Appeal together with a written submission. In addition, Kazakhstan has stated and it has not been disputed that the High Court expects to give judgment before the end of this year on Stati et al's application in England. It therefore stands to reason to also await the judgment of the High Court and to offer Kazakhstan the opportunity to submit that judgment in evidence. To that end, the Court of Appeal will refer the case to the docket list for 5 February 2019 for the filing of a written submission by Kazakhstan, following which Stati et al will be given the opportunity to file a written response. The Court of Appeal will then order a resumed hearing, in which context the parties must indicate their dates of unavailability in good time.

2.20 With this procedure an overrun of the reasonable period as provided for in Article 6 of the ECHR, or an unreasonable delay as provided for in Article 20 DCCP, as Stati et al fear, will not be at issue. Furthermore, the Court of Appeal holds that Article 22 DCCP, and more generally the authority of the Dutch court to issue instructions, provides sufficient basis for the decision given as set out below. Nor is that decision precluded by Article III of the New York Convention. There exists no substantially more onerous condition than that which the recognition or enforcement of domestic arbitral awards must fulfil. In an application for the enforcement of a Dutch arbitral award, the court is also required to investigate, in the same way and under the same conditions, whether the arbitral award or the means by which it was obtained is contrary to public policy. Moreover, the fact that Article VI of the New York Convention provides that the court can suspend a decision on an application for the recognition and enforcement of a (foreign) arbitral award in the event of an application to set aside that award does not prevent the court from conducting a further investigation in other cases.

2.21 The foregoing implies that the Court of Appeal does not see sufficient cause, at the current state of affairs, with the currently available papers, to decide that the arbitral awards have been obtained by fraud and that for that reason recognition or enforcement of those awards would be contrary to public policy. The allegations made by Kazakhstan to that effect have, for the time being, been disputed by Stati et al. with sufficient reasoned counter-allegations.

2.22 The Court of Appeal does not see sufficient cause to grant the application before it pursuant to Article 843a DCCP already at this stage – not only because it is unclear whether the documents in question have already been produced, but also because further examination of the documents that have been produced, or a reading of the judgment of the High Court, could mean that Kazakhstan has no further interest in the production of the said documents.

2.23 The Court of Appeal will defer any further decision, including a decision on the other grounds for refusal advanced by Kazakhstan in its statement of defence, until after the resumed hearing.

3. Decision

The Court of Appeal:

declares that it has jurisdiction to hear this application;

refers the case to the docket list for Tuesday 5 February 2019 for the filing of a written submission by Kazakhstan for the purpose described in 2.19 above, following which Stati et al will be listed for a response submission on 5 March 2019;

orders that the resumed oral hearing of the application will take place at the Law Courts at IJdok 20 in Amsterdam at a date and time to be indicated subsequently;

rules that counsel for Stati et al must apply to the court in writing on or before 5 March 2019 for a new date, at the same time providing the unavailability dates of all of the aforementioned involved parties in the period from April 2019 up to and including June 2019;

rules that this decision is open to an interim appeal to the Supreme Court;

defers any further decision.

This decision was given by D. Kingma, W.H.F.M. Cortenraad and A.M.A. Verscheure and pronounced in open court by the docket judge on 6 November 2018.

[signature]

[signature]
A.R. Sturhoofd