

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ANATOLIE STATI; GABRIEL STATI;	)	
ASCOM GROUP, S.A.; TERRA RAF TRANS	)	
TRAIDING LTD.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. 1:14-cv-1638-ABJ
	)	
REPUBLIC OF KAZAKHSTAN,	)	
	)	
Respondent.	)	
	)	

**MOTION BY RESPONDENT REPUBLIC OF KAZAKHSTAN  
FOR LEAVE TO SUBMIT ADDITIONAL GROUNDS IN SUPPORT OF OPPOSITION  
TO PETITION TO CONFIRM ARBITRAL AWARD**

Respondent Republic of Kazakhstan (“Respondent” or “Kazakhstan”) hereby requests leave to submit additional grounds in support of its Opposition to the Petition to Confirm Arbitral Award filed by Anatolie Stati, Gabriel Stati, Ascom Group, S.A., and Terra Raf Trans Traiding Ltd. (collectively, the “Petitioners” or the “Stati Parties”). For the reasons set forth below, the proposed deadline for this submission is May 18, 2016.

**LOCAL CIVIL RULE 7(M) CERTIFICATION**

Pursuant to LCvR 7(m), undersigned counsel conferred with opposing counsel in a good-faith effort to determine whether there was any opposition to the relief sought. Opposing counsel represented that Petitioners did not consent to the relief sought and would oppose the motion.

**STATEMENT OF FACTS**

This case arises, as referenced in the previous filings, from arbitral proceedings instituted by Petitioners against Respondent under the Arbitration Rules of the Stockholm Chamber of Commerce (the “SCC Arbitration”), purportedly pursuant to the terms of the Energy Charter Treaty, I.E.L. III-0068, Dec. 17, 1994.

On December 19, 2013, the arbitral tribunal issued an award (the “SCC Award”) in Petitioners’ favor against Kazakhstan in the amount of \$497,685,101.00, plus costs.<sup>1</sup> A significant portion of the damages awarded to Petitioners —\$199 million—represented compensation for a liquefied petroleum gas plant (the “LPG Plant”). *See* SCC Award ¶ 1856.

During the SCC Arbitration, the Petitioners had demanded compensation for the alleged expropriation by Respondent of certain of their assets in Kazakhstan. One such asset was the LPG Plant. To support this compensation claim, Petitioners’ representatives submitted sworn testimony, provided expert testimony relying on this sworn testimony, and offered other evidence, that they had incurred \$245 million in costs to construct the LPG Plant. In turn, Respondent relied upon this \$245 million number in attempting to defend against Petitioners’ claims. This all is referenced throughout the SCC Award. *See, e.g.*, SCC Award ¶¶ 199, 1694, 1699, 1704, 1712, 1724-25, 1728, 1737, 1740, 1745.

In March 2014, Kazakhstan initiated proceedings before the Svea Court of Appeal in Stockholm, Sweden (the “Swedish Proceeding”) to set aside the SCC Award under the Swedish Arbitration Act, contending that the facts and circumstances giving rise to the SCC Award constituted violations of the Energy Charter Treaty, the arbitration rules of the SCC, and Kazakhstan’s due process rights.

On September 30, 2014, Petitioners commenced the present action by filing the Petition to Confirm.<sup>2</sup> On February 26, 2015, Kazakhstan filed its opposition to the petition (Dkt. 20), setting out the multiple grounds for why it contends the SCC Award is unenforceable under the

---

<sup>1</sup> A copy of the SCC Award is attached as Ex. A to the Decl. of Charlene Sun (Dkt. 2) in support of the Petition to Confirm (Dkt. 1).

<sup>2</sup> On February 4, 2014, the Stati Parties filed their original petition to confirm the SCC Award in this Court. *See* No. 1:14-cv-00175-ABJ. That petition was not served and, on May 7, 2014, was voluntarily dismissed. *Id.*, Dkt. 11.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and therefore 9 U.S.C. § 207. These grounds were similar to those presented by Kazakhstan in the Swedish Proceeding. *See* Dkt. 20, Ex. 21. On April 23, 2015, Petitioners filed a reply. Dkt. 24. On May 26, 2015, Kazakhstan filed a sur-reply. Dkt. 28.<sup>3</sup>

After this briefing was complete, Kazakhstan began to obtain documentation that was previously unavailable to it and which provided additional grounds for refusal of recognition of the SCC Award. This documentation was obtained, in part, as a result of 28 U.S.C. §1782 proceedings that had been initiated by Kazakhstan in the United States District Court for the Southern District of New York (“S.D.N.Y.”) in aid of the Swedish Proceeding. *See In re Ex Parte Application of Petitioner Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, No. 1:15-mc-0081-P1 (S.D.N.Y.). The relevant details of those proceedings are set out in the S.D.N.Y.’s final Opinion and Order in Kazakhstan’s favor, a true and correct copy of which is attached hereto as Ex. A. In short, Petitioners were, at the same time as the SCC Arbitration, also participants in three other arbitration proceedings “where valuation of the same LPG Plant was allegedly at issue.” Ex. A. at 2. These three other arbitrations were confidential and all involved, on one side, a company associated with Petitioners and, on the other side, companies associated with the Vitol Group of companies. *Id.* The three arbitrations are referred to herein as the “Vitol Arbitrations.” The Vitol Group of companies were represented in the Vitol Arbitrations by the law firm of Clyde & Co. *Id.*

Kazakhstan filed the S.D.N.Y. proceedings to obtain court permission under 28 U.S.C. § 1782 to issue a subpoena to Clyde & Co. to compel production of the documents from the

---

<sup>3</sup> On November 9, 2015, in response to an order of the Court, the parties filed further briefing on the question of whether the Court may exercise subject matter jurisdiction over this case. Dkt. 30, 31. Since then, there has been no docket activity.

Vitol Arbitrations relevant to valuation of the LPG Plant. *Id.* at 1-2. Discovery was appropriate because, Kazakhstan asserted, documents from the Vitol Arbitrations “may reveal that the arbitral committee relied on falsified evidence and the award could therefore be manifestly incompatible with Swedish public policy. *Id.* at 6 (citing Kazakhstan Mem. in Opp. to Motion to Vacate and Quash at 17-18). The S.D.N.Y. (Hon. Kimba Wood) granted this permission but Petitioners immediately intervened and filed a motion to vacate and a motion to quash the subpoena. *Id.* at 1 (recounting procedural history). After an in-person hearing, the S.D.N.Y. (Hon. Sidney H. Stein) issued the Opinion and Order on June 22, 2015, rejecting Petitioners’ arguments and denying their motion to vacate and motion to quash. *See id.* at 9. This allowed Clyde & Co. to produce the requested documents to Kazakhstan, which they did, starting June 26, 2015. Clyde & Co.’s production continued through August, 2015.

The documents produced by Clyde & Co., combined with other efforts by Kazakhstan that are still ongoing, have revealed that Petitioners submitted false testimony and evidence to the SCC Arbitration tribunal and thus obtained the SCC Award through fraud. In short, Petitioners fraudulently and materially misrepresented the LPG Plant construction costs for which they claimed reimbursement in the SCC Arbitration. This is established, Kazakhstan contends and will demonstrate to the Court, by sworn testimony of Petitioners in the Vitol Arbitrations that conflicts with their testimony in the SCC Arbitration, and other documents since obtained by Kazakhstan.

#### **STATEMENT OF POINTS AND AUTHORITIES**

The New York Convention, Article V(2)(b) provides that recognition and enforcement of an arbitral award may be refused if the “recognition or enforcement of the award would be contrary to the public policy” of the country in which enforcement is sought. Courts and

commentators agree that attempting to enforce a fraudulently-obtained award would be a clear violation of United States public policy warranting refusal of recognition under the New York Convention. As stated by the Fifth Circuit:

Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud. Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration.

*Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004).<sup>4</sup> The intentional giving of false testimony also can render an arbitral award unenforceable under Article V(1)(b) of the New York Convention, which addresses the circumstance of a party being “otherwise unable to present his case.” *See Nat’l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 814 (D. Del. 1990).

The standards for permitting further briefing with respect to a petition to confirm an arbitral award have not, to the knowledge of undersigned counsel, been addressed in this jurisdiction. By analogy, however, Fed. R. Civ. P. 15(d) provides: “On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” District courts in this jurisdiction have observed that:

Supplements under Rule 15(d) always require leave of the court, and should be “freely granted when doing so will promote the economic and speedy disposition of the entire

---

<sup>4</sup> The same three-prong test identified in *Karaha Bodas* has been applied by this Court when considering whether to vacate domestic arbitration awards procured by fraud. *See ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, 961 F. Supp. 2d 245, 254-55 (D.D.C. 2013) (vacatur is proper under the Federal Arbitration Act, 9 U.S.C. § 10(a)(1), if (i) the award creditor “actually engaged in fraudulent conduct or used undue means during the course of the arbitration,” (ii) “the fraud could not have been discovered before or during the arbitration through the exercise of reasonable diligence,” and (iii) “the alleged misconduct must materially relate to an issue in the arbitration.”) (quotation marks and alterations omitted). The *ARMA* court further accepted that “perjury during the course of arbitral proceedings might very well justify vacatur of an award[.]” *Id.* at 257.

controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.”

*Jones v. Bernanke*, 685 F. Supp. 2d 31, 35 (D.D.C. 2010) (citing *Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006) and *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 2d 18, 23 (D.D.C. 2008)). While Rule 15 is not directly applicable here given that Kazakhstan is not requesting leave to supplement a “pleading,” borrowing the standards developed under Rule 15, Kazakhstan’s proposed supplemental filing addresses an “occurrence” and “event” that happened after the filing of Kazakhstan’s sur-reply in opposition to the Petition to Confirm, i.e., Kazakhstan coming into possession of new evidence that supports additional and independent grounds under the New York Convention for denying confirmation of the SCC Award. A supplemental filing is required to present these grounds to the Court.

Other good cause exists to grant Kazakhstan’s motion. The proposed supplemental filing will promote the economic and speedy disposition of the present controversy as it will allow for all grounds of challenge to the SCC Award under the New York Convention to be presented and resolved in one proceeding. It will not cause any undue delay, inconvenience or prejudice given that there is no fixed date for resolution of these proceedings, no oral argument has been scheduled, and Petitioners will have full opportunity to respond to the additional grounds. Further, the interests of justice require allowing the supplemental filing since it will present facts that, in Kazakhstan’s contention, render the SCC Award unenforceable, both because it is contrary to the public policy of the United States on account of fraud in the underlying arbitration proceedings, and because Kazakhstan was denied the opportunity to present its case.

To date, Kazakhstan has not completely unraveled the totality of Petitioners’ fraud. However, Kazakhstan presently understands that the \$199 million awarded to Petitioners for the LPG Plant in the SCC Arbitration was a direct result of the fraud. Given that this \$199 million is

a material component of the circa \$498 million SCC Award, it renders the entire award unenforceable, at minimum, as contrary to public policy under Articles V(2)(b) of the New York Convention. The full details of this fraud will be set out in Kazakhstan's supplemental filing.

The time is now appropriate to present these additional grounds to the Court. In the Swedish Proceeding, Kazakhstan currently is in the process of presenting its evidence of the Petitioners' fraud to the court. This process has been ongoing for the past several months. Originally, a hearing was scheduled on Kazakhstan's annulment proceedings in the Svea Court of Appeal for November 2015. After Kazakhstan obtained the above-referenced evidence of Petitioners' fraud, it informed the Swedish court that it would be adding these new grounds. In consequence of this new development, and after further discussions between the parties and the court, the November 2015 hearing was continued and a new hearing is set to proceed during the period from September 8 to October 10, 2016. Among other interlocutory scheduling dates, Kazakhstan is scheduled to submit its Final Statement of Evidence to the Swedish court on May 4, 2016. After this date, and by May 18, 2016, Kazakhstan will be in position to present its additional grounds to this Court.

### **CONCLUSION**

For the foregoing reasons, Kazakhstan requests that this motion be granted and that it be granted leave to file its supplemental pleading on or before May 18, 2016. A proposed order is attached.

Dated: April 5, 2016

Respectfully submitted,

/s/ Matthew H. Kirtland

---

Matthew H. Kirtland (D.C. Bar No. 456006)  
[matthew.kirtland@nortonrosefulbright.com](mailto:matthew.kirtland@nortonrosefulbright.com)