

COPY

**No. 25/2021
of 11.02.2021
Registry Number CAS-2020-00040**

**Public hearing of the Court of Cassation of the Grand-Duchy of Luxembourg of
Thursday, eleventh February Two Thousand and Twenty-one.**

Composition:

Jean-Claude WIWINIUS, president of the Court,
Eliane EICHER, judge at the Court of Cassation,
Michel REIFFERS, judge at the Court of Cassation,
Roger LINDEN, judge at the Court of Cassation,
Anne-Françoise GREMLING, judge at the Court of Appeal,
Isabelle JUNG, advocate general,
Daniel SCHROEDER, clerk to the Court.

Between:

the REPUBLIC OF KAZAKHSTAN, represented by the President of the Republic and in so far as necessary by the Prime Minister, or by any other person authorised for this purpose, for all actions and proceedings by the Department for provision of court's activity under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan) established at Dinmukhamed Qonayev Street 39, Nur-Sultan 010000, Kazakhstan, failing which by the Ministry of Justice, represented by the Minister of Justice, established at 8, rue Magilik El, House of Ministries, 13 Entrance 010000, Nur-Sultan Kazakhstan,

petitioner in the appeal to the Court of Cassation,

represented by the public limited company ARENDT & MEDERNACH, registered in list V of the roll of the Bar Association of Luxembourg, in the offices of which it elects to receive service of notice, represented for the purposes of these proceedings by Maître François KREMER, lawyer at the Court of Cassation,

and:

1) the Moldovan company ASCOM GROUP, established and having its registered office at 75, rue Mateevici, Chisinau, MD-2009 Moldova, represented by the chairman or by any other person authorised for this purpose, registered under number 1002600006034,

2) Anatolie STATI, residing at 20, rue Dragomima, Chisinau, MD-2008 Moldova,

3) Gabriel STATI, residing at IA, rue Dragomima, Chisinau, MD-2008 Moldova,

4) the Gibraltarian company TERRA RAF TRANS TRADING LTD, established and having its registered office at 13/1 Line Wall Road, Gibraltar, British overseas territory, represented by the director or any other person authorised for this purpose, registration number 68609,

respondents in the appeal to the Court of Cassation,

represented by the private limited company NAUTADUTILH AVOCATS LUXEMBOURG, registered in list V of the roll of the Bar Association of Luxembourg, in the offices of which it elects to receive service of notice, represented for the purposes of these proceedings by Maître Antoine LANIEZ, lawyer at the Court of Cassation,

Having regard to the judgement appealed against, number 133/19, issued on 19 December 2019 under roll number CAL-2018-00013 by the Court of Appeal of the Grand-Duchy of Luxembourg, eighth chamber, in civil and exequatour proceedings;

Having regard to the written submissions in the appeal to the Court of Cassation intimated on 12 March 2020 by the REPUBLIC OF KAZAKHSTAN to the Moldovan company ASCOM GROUP, to Anatolie STATI, to Gabriel STATI and to the Gibraltarian company TERRA RAF TRANS TRADING LTD, lodged on 16 March 2020 with the registry of the Court of Cassation;

Having regard to the written submissions in response intimated on 8 May 2020 by the company ASCOM GROUP, by Anatolie STATI, by Gabriel STATI and by the company TERRA RAF TRANS TRADING LTD to the Republic of KAZAKHSTAN, lodged on 12 May 2020 with the registry of the Court of Cassation;

On the report of the judge Roger LINDNE and the submissions of the first advocate general Marie-Jeanne KAPPWEILER;

Regarding the facts

According to the judgement appealed against, the first vice-president of the district court of Luxembourg had, by a ruling dated 30 August 2017, declared enforceable in the Grand-Duchy of Luxembourg the arbitration award dated 19 December 2013 of the Institute of Arbitration of the Chamber of Commerce of Stockholm, as amended on 17 January 2014, issued between the REPUBLIC OF KAZAKHSTAN on the one hand and the Moldovan company ASCOM GROUP, Anatolie STATI and Gabriel STATI and the Gibraltarian company TERRA RAF TRANS TRADING LTD on the other hand. The Court of Appeal confirmed this ruling.

Regarding the request to reject the exhibits produced by the petitioner in the appeal to the Court of Cassation

The respondents in the appeal to the Court of Cassation submit that the exhibits numbered 28 to 35, 39, 40, 42, 44, 45 and 48 to 50 lodged by the petitioner in the appeal to the Court of Cassation in support of the written submissions in the appeal to the Court of Cassation should be rejected on the ground that they had not been produced before the Court of Appeal.

Article 25 of the amended law of 18 February 1885 concerning appeals and the procedure before the Court of Cassation provides that *“The facts alleged in the written submissions intimated before the judgement which rules upon the appeal, and not established by the judgement or the ruling appealed against, may only be proven by written exhibits produced before the judge who issued the decision which has been appealed against”*.

It emerges from the judgement appealed against that the Court of Appeal rejected all the exhibits lodged by the petitioner during the course of the deliberations due to not respecting the principle of hearing both parties, but analysed the pertinence of exhibits 34 and 35 in support of the application to revoke the order closing the investigation.

It follows from this that exhibits 28 to 33, 39, 40, 42, 44, 45 and 48 to 50 are to be excluded from the debates.

Regarding the seventh preliminary ground for the appeal to the Court of Cassation

Statement of the ground

“drawn from the violation of article 65 of the New Code of Civil Procedure which provides that:

“The judge must in all circumstances ensure the observance of and himself observe the principle of hearing both parties.

He may only consider in his decision grounds, explanations and documents invoked or produced by the parties if these latter have been subject to a debate in which both parties have been heard.

He cannot base his decision on grounds of law that he has raised ex-officio without having invited the parties to present their observations on them in advance.”

of article 47 of the Charter of Fundamental Rights of the European Union in terms of which:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

of article 6, paragraph 1, of the European Convention of Human Rights which consecrated in law the right to a fair process in terms of which:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

and having regard to article 13 of the European Convention of Human Rights which consecrated in law the right to an effective remedy in terms of which:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

in respect that the judgement appealed against,

rejecting the appeal brought by the Republic of Kazakhstan and ordering this latter to pay the expenses, and thus confirming the declaration of exequatur of the Arbitration Award,

has considered in the case in point that “the allegations advanced by the appellant, even supposing they were established, and the fact that KPMG had withdrawn its reports it concerning financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not of a nature to constitute a fraud vitiating the very base of the investment of the intimated parties in Kazakhstan, since this investment had commenced well prior to the manœuvres criticised by the appellant. Hence they are not of a nature to result in an influence on the competence of the Arbitration Tribunal” (page 35 of the judgement appealed against);

and that “both the arguments of fraud already previously alleged before the SVEA Court and the few new elements of proof invoked before this Court and the new element currently invoked relative to KPMG letter, have the aim of establishing that KMG’s indicative offer rests on false elements and consequently could not serve the arbitrators to establish the damages for the GPL plant” (page 40 of the judgement appealed against);

whereas in doing so the Court of Appeal founded its decision on elements not debated in the presence of both parties thus violating the principle of hearing both parties and hence the right to a fair trial”.

Response of the Court of Cassation

Having regard to article 65 of the New Code of Civil Procedure.

By taking into consideration two exhibits not subject to debate by both parties to analyse them regarding their effect on the outcome of the dispute, the appeal judges have violated the provision mentioned above.

It follows from this that the judgement must be set aside.

Regarding the application to allocate an indemnity for proceedings

Since the respondents in the appeal to the Court of Cassation are to be ordered to bear the costs of the appeal to the Court of Cassation, their request to be allocated an indemnity for proceedings is to be rejected.

FOR THESE REASONS,

and without their being grounds to rules on the other grounds of appeal,

The Court of Cassation:

sets aside and annuls the judgement issued on 19 December 2019 by the Court of Appeal, eighth chamber, sitting in civil and exequatour matters under roll number CAL- 2018-00013;

declares null and void the said court decision and the acts which have followed it, returns the parties to the state they found themselves in before the judgement that has been set aside and for justice to be done, refers them back to the Court of Appeal, otherwise composed;

rejects the applicants of the respondents in the appeal to allocate an indemnity for proceedings;

orders them to bear the costs of the proceedings before the Court of Cassation with an award of costs in favour of the public limited company ARENDT & MEDERNACH, in relation to its declarations in law;

order that at the diligence of the attorney general, this judgement is to be transcribed in the register of the Court of Appeal of the Grand-Duchy of Luxembourg and that a comment referring to the transcription of the judgement be made in the margin of the official record of the judgement annulled.

This judgement has been read aloud in the aforesaid public hearing by the president Jean-Claude WIWINIUS in the presence of the advocate general Isabelle JUNG and the clerk Daniel SCHROEDER.