

Civil judgment no. 2021TALCH11/00001 (XI chamber)

Public hearing on Friday, eighth of January two thousand and twenty-one

Roll numbers TAL-2018-03665 and TAL-2018-03667

Composition:

Paule MERSCH, vice-president,	Signature [illegible]
Joe ZEIMETZ, senior judge,	
Stéphane SANTER, judge,	Signature [illegible]
Arnold LAHR, clerk to the court.	

I.

(TAL-2018-03665)

BETWEEN:

- 1.) The Moldovan company Ascom Group S.A.**, established and with its company registered office at MD-2009 Chisinau (Moldova), 75, Mateevici road, represented by its currently appointed Chairman, or by any other body authorised for the purpose, registered under number 1002600006034,
- 2.) Anatolie STATI**, businessman, residing at MD-2008 Chisinau (Moldova), 20, Dragomirna road,
- 3.) Gabriel STATI**, businessman, residing at MD-2008 Chisinau (Moldova), 1A, Ghiocailor road,
- 4.) The Gibraltar company, Terra Raf Trans Traiding Ltd**, established and with its company registered office in Gibraltar, British overseas territory, 13/1 Line Wall Road, represented by its current appointed director or by any other body authorised for the purpose, registered under number 68609,

Plaintiffs in a garnishment order writ of 7 December 2017 duly served by the Court bailiff Véronique REYTER of Esch-sur-Alzette.

Appearing via the limited liability company NAUTADUTILH AVOCATS Luxembourg S.a.r.l., established and with its registered office at L-1233 Luxembourg, rue Jean Bertholet, represented by Maître Antoine LANIEZ, barrister-at-law, residing in Luxembourg,

AND:

The REPUBLIC OF KAZAKHSTAN, represented by its currently appointed President of the Republic and insofar as is necessary its currently appointed Prime Minister, or by any other body authorised for the purpose, legal suits and proceedings by the *Department for provision of courts' activity under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan)*, at its address at Dinmukhamed Qonayev Street 39, Astana 010000, Kazakhstan,

Respondent for the purposes of the abovementioned garnishment order writ duly served by bailiff REYTER,

Appearing via the public limited company ARENDT & MEDERNACH, established and with its company registered office at L-2082 Luxembourg, 41A, avenue J.F. Kennedy, represented by Maître François KREMER, barrister-at-law, residing in Luxembourg.

II.

(TAL-2018-03667)

BETWEEN:

1.) The Moldovan company Ascom Group S.A., established and with its company registered office at MD-2009 Chisinau (Moldova), 75, Mateevici road, represented by its currently appointed Chairman, or by any other body authorised for the purpose, registered under number 1002600006034,

2.) Anatolie STATI, businessman, residing at MD-2008 Chisinau (Moldova), 20, Dragomirna road,

3.) Gabriel STATI, businessman, residing at MD-2008 Chisinau (Moldova), 1A, Ghiocailor road,

4.) The Gibraltar company, Terra Raf Trans Traiding Ltd, established and with its company registered office in Gibraltar, British overseas territory, 13/1 Line Wall Road, represented by its current appointed director or by any other body authorised for the purpose, registered under number 68609,

Plaintiffs in a garnishment order writ duly served by the Court bailiff Véronique REYTER of Esch-sur-Alzette of 22 August 2017,

appearing via the limited liability company NAUTADUTILH AVOCATS LUXEMBOURG S.a.r.l., established and with its registered office at L-1233 Luxembourg, rue Jean Bertholet, represented by Maître Antoine LANIEZ, barrister-at-law, residing in Luxembourg,

AND:

The REPUBLIC OF KAZAKHSTAN, represented by its currently appointed President of the Republic and insofar as is necessary its currently appointed Prime Minister, or by any other body authorised for the purpose, legal suits and proceedings by the *Department for provision of courts' activity under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan)*, at its address at Dinmukhamed Qonayev Street 39, Astana 010000, Kazakhstan,

Respondent for the purposes of the abovementioned garnishment order writ duly served by bailiff REYTER,

Appearing via the public limited company ARENDT & MEDERNACH, established and with its company registered office at L-2082 Luxembourg, 41A, avenue J.F. Kennedy, represented by Maître François KREMER, barrister-at-law, residing in Luxembourg.

THE COURT

Given the [case preparation] closure orders of 11 December 2020,

Given the notice of determination of 9 December 2020 by which the parties' representatives were informed of the Court's composition,

The cases were deliberated at the hearing of 11 December 2020 by His Honour senior judge Joe ZEIMETZ, delegated for these purposes,

Having heard the Moldovan company Ascom Group S.A., Anatolie STATI, Gabriel STATI and the Gibraltar company, Terra Raf Trans Traiding Ltd through their representative Maître Antoine LANIEZ, barrister-at-law,

Having heard the REPUBLIC OF KAZAKHSTAN through their representative Maître François KREMER, barrister-at-law.

FACTS AND BACKGROUND

Pursuant to an arbitral award made by the Stockholm Chamber of Commerce on 19 December 2013, modified by an amending arbitral award of 17 January 2014 (hereinafter "the arbitral award"), the Moldovan company Ascom Group SA, Anatolie STATI, Gabriel STATI and the Gibraltar-based company Terra Raf Trans Traiding Ltd. have, on 16 August 2017, served a garnishee order on:

the limited liability company Eurasian Resources Group Sarl,

the public limited company ArcelorMittal SA,

the public limited company Cameco Luxembourg SA,

the limited liability company Tengizchevroil Finance Company Sarl,

on all sums, dividends, monies, securities, bonds, debentures, claims or property of any kind, to the extent not covered by state immunity, which they have or will have, may or will hold, pay or receive, owe or will owe to or on behalf of the REPUBLIC OF KAZAKHSTAN, in any capacity and for any reason whatsoever, as well as,

on all shares or holdings of Eurasian Resources Group Sarl, ArcelorMittal SA, Cameco Luxembourg SA and Tengizchevroil Finance Company Sarl, which belong to the REPUBLIC OF KAZAKHSTAN,

to ensure retention of their rights and payment of a total amount of USD 434,914,531.20 relating to a principal amount of USD 497,685,101.00, plus accrued interest to 16 August 2017 of USD 8,571,504.61, the amounts set at USD 8,975,496,40 and 802,103.24 euros (reimbursement of costs of proceedings, including lawyers' fees incurred in the course of the arbitral proceedings), in addition to an amount of 50,000 euros as a provision for additional interests, currency fluctuations and legal expenses.

This garnishment order was notified to the REPUBLIC OF KAZAKHSTAN by a bailiff's writ of 22 August 2017, this writ also contained a summons to validate the garnishment and a request for an order to be entered against the REPUBLIC OF KAZAKHSTAN for payment of a procedural indemnity of 5,000 euros on the basis of article 240 of the New [Luxembourg] Civil Proceedings Code, as well as the costs and expenses of the proceedings, including translation costs.

A writ to notify the garnishees was sent on 23 August 2017.

These proceedings were recorded under the roll number TAL-2018-03667.

Pursuant to the arbitral award, the Moldovan company Ascom Group SA, Anatoile STATI, Gabriel STATI and the Gibraltar company Terra Raf Trans Traiding Ltd (hereinafter "the STATI partners") have, on 16 August 2017, served a garnishee order on:

- the Luxembourg branch of Bank of New York Mellon (International) Limited,
- the Luxembourg branch of Bank of New York Mellon SA/NV,
- the public limited company BNY Mellon Fund Management (Luxembourg) SA,
- the limited liability company BNY Mellon GSS Holdings (Luxembourg) Sarl,

on all sums, dividends, monies, securities, bonds, debentures, claims or property of any kind, to the extent not covered by state immunity, which they have or will have, may or will hold, pay or receive, owe or will owe to or on behalf of the REPUBLIC OF KAZAKHSTAN, in any capacity and for any reason whatsoever,

to ensure retention of their rights and payment of a total amount of 441,149,085.56 euros relating to a principal amount of USD 497,685,101.00 , plus accrued interest to 1 December 2017 of USD 10,000,571.85, the amounts set at USD 8,975,496,40 and 802,103.24 euros (reimbursement of costs of proceedings, including lawyers' fees incurred in the course of the arbitral proceedings), in addition to an amount of 100,000 euros as a provision for additional interests, currency fluctuations and legal expenses.

This garnishment order was notified to the REPUBLIC OF KAZAKHSTAN by a bailiff's writ of 7 December 2017, this writ also contained a summons to validate the garnishment and a request for an order to be entered against the REPUBLIC OF KAZAKHSTAN for payment of a procedural indemnity of 10,000 euros on the basis of Article 240 of the New [Luxembourg] Civil Proceedings Code, as well as the costs and expenses of the proceedings, including translation costs.

A writ to notify the garnishees was sent on 12 December 2017.

These proceedings were recorded under the roll number TAL-2018-03665.

By presidential order number 40/2017 issued on 30 August 2017, the arbitral award was declared enforceable in the Grand-Duchy of Luxembourg.

On 27 May 2019, the REPUBLIC OF KAZAKHSTAN filed a criminal complaint with a claim for civil damages, dated 24 May 2019, before a Luxembourg investigating judge against the STATI partners for offences described as:

- Forgery and use of forgeries, respectively attempted forgery and use of forgeries in the sense of Articles 196 and 197 of the Luxembourg Criminal Code.

- Fraud, respectively attempted fraud in the sense of Article 496 of the Criminal Code,
- money laundering, respectively attempted money laundering in the sense of Article 506-1 of the Criminal Code.

By judgment number 133/19 - VIII - Exequatur issued on 19 December 2019 by the Luxembourg Court of Appeal, the appeal of the REPUBLIC OF KAZAKHSTAN against order number 40/2017 of 30 August 2017, by which the arbitral award was declared enforceable in the Grand Duchy of Luxembourg, was dismissed.

On appeal against an order of 9 October 2019, by which the investigating judge in Luxembourg declared himself territorially incompetent to investigate the facts underlying the criminal complaint with a civil claim for damages of the REPUBLIC OF KAZAKHSTAN, the Council Chamber of the Luxembourg Court of Appeal declared, by a judgment number 95/20 issued on 28 January 2020, that "*the investigating judge at the District Court of and in Luxembourg is territorially competent to investigate the facts underlying the complaint with a civil claim of 24 May 2019*".

PLEAS AND SUBMISSIONS OF THE PARTIES

The STATI partners submit that by a judgment handed down on 19 December 2019, the Luxembourg Court of Appeal dismissed the appeal of the REPUBLIC OF KAZAKHSTAN against the enforcement order of 30 August 2017 declaring the arbitral award to be enforceable. The ruling would therefore be henceforth enforceable in Luxembourg, notwithstanding any appeal in cassation. In the arbitral award, the REPUBLIC OF KAZAKHSTAN was found guilty of "*a series of coordinated harassment measures*", which would have caused the total loss of their STATI partners' investments in Kazakhstan. The Arbitral Court would effectively have decided that the REPUBLIC OF KAZAKHSTAN had breached its obligations to treat foreign investors in a "*fair and equitable*" manner under the ECT. The arbitral award would not be subject to appeal and would therefore be final. If the REPUBLIC OF KAZAKHSTAIN was unwilling to comply, the STATI partners would be forced to take enforcement proceedings in several countries in order to obtain payment of the sums due. The STATI partners therefore have initiated enforcement proceedings in the United States, England, the Netherlands, Belgium, Sweden, Italy and the Grand-Duchy of Luxembourg.

The REPUBLIC OF KAZAKHSTAN contests the STATI partners' petition, maintaining that the arbitral award, in addition to the Luxembourg Court of Appeal judgment of 19 December 2019 dismissing the REPUBLIC OF KAZAKHSTAN's appeal against the enforcement order of the arbitral award, would have been obtained by fraud.

The REPUBLIC OF KAZAKHSTAN maintains that the STATI partners deliberately misled the Arbitral Court and the Luxembourg Court of Appeal by submitting documents they knew to be forged and falsified. The claimants' machinations allegedly affected not only the entire arbitration procedure, but also all related proceedings. The evidence uncovered by the REPUBLIC OF KAZAKHSTAN over the last few years and especially in 2019 would have been submitted to independent experts.

In order to establish its claims, the REPUBLIC OF KAZAKHSTAN refers to the findings of Dr. Scholdstrom, Judge of the Svea Court of Appeal, Professor Christoph Schreuer, Professor George Bermann of Columbia University, PricewaterhouseCoopers International, and a "*former US prosecutor who now works for the anti-corruption agency Stream House A.G.*".

The REPUBLIC OF KAZAKHSTAN argues that it would currently present evidence relating to fraud by the STATI partners, which they were not able to present before the Luxembourg Court of Appeal during the enforcement proceedings, as the investigation of the case was closed before the evidence was discovered.

As regards the context of the dispute, the REPUBLIC OF KAZAKHSTAN explains that Anatolie and Gabriel STATI are entrepreneurs of Moldovan and Romanian nationality, who acquired all the shares of two Kazakh companies, namely Kazpolmunay LLP (hereafter "KPM") and Tolkynneftegaz LLP (hereafter "TNG"). Prior to the acquisition by the STATI partners, KPM and TNG had obtained the authorization from the REPUBLIC OF KAZAKHSTAN to explore and develop various oil and gas deposits in Kazakhstan in accordance with sub-soil use contracts. In 2006, the STATI partners, via their

company TNG, initiated a project to construct a factory to produce liquefied petroleum gas in Kazakhstan (hereinafter "LPG factory"). At the end of 2008, the Kazakh authorities reportedly highlighted several serious breaches committed in the context of the activities carried out by KPM and TNG. As a result of these breaches, the Ministry of Oil and Gas of the REPUBLIC OF KAZAKHSTAN, in July 2010, terminated the contracts for the use of the subsoil, which had been awarded to KPM and TNG. Alleging a violation of the Energy Charter Treaty (hereinafter "ECT"), the STATI partners initiated an arbitration procedure, which resulted in the arbitral award. In this context, the STATI partners claimed to have invested more than USD 245 million in the construction of a LPG factory and to have been the victims of a campaign of harassment initiated by the REPUBLIC OF KAZAKHSTAN, which led to the financial suffocation of TNG and KPM.

The REPUBLIC OF KAZAKHSTAN states that the Arbitral Court would have concluded that the REPUBLIC OF KAZAKHSTAN's actions would have had a detrimental affect on the financial situation of TNG and KPM. The evidence uncovered by the REPUBLIC OF KAZAKHSTAN would however establish that this financial situation was entirely the result of a misappropriation of funds undertaken by the STATI partners.

The REPUBLIC OF KAZAKHSTAN contends that the fraud carried out by the STATI partners would have had an impact on the Arbitral Court's competence, on the liability of the REPUBLIC OF KAZAKHSTAN as held by the Arbitral Court, as well as on the *quantum* of alleged damages awarded by the Arbitral Court. The STATI partners would have deliberately misled the Arbitral Court through its submission of documents, which they would have been aware were created on the basis of false information. The STATI partners would have carried out various fraudulent stratagems aimed at artificially inflating the construction costs of the LPG factory. The STATI partners would then have used the result of these fraudulent stratagems to deliberately deceive the Arbitral Court. The fraud relating to the *quantum* of damages was confirmed by the sworn declaration of "Mr Lungu" before an American Court and by KPMG in a letter of 21 August 2019. In this letter, KPMG stated that it had retracted all its audit reports relating to TNG and KPM.

The REPUBLIC OF KAZAKHSTAN points out that in order to determine the *quantum* of the damage, the Arbitral Court would have based it on an indicative offer of 25 September 2008. This indicative offer would have been made on the basis on the annual accounts of TNG, which held the LPG factory. However, these accounts would have been artificially inflated, thus falsifying the offer amount. The Arbitral Court would therefore have based the *quantum* on a document, which the STATI partners would have known to be a forgery. This document would also have been submitted as part of the enforcement proceedings in Luxembourg. The result would be that the enforcement decision obtained in Luxembourg would constitute a criminal fraud.

The REPUBLIC OF KAZAKHSTAN refers to its claim for civil damages in a criminal complaint, filed on 27 May 2019, in the hands of the investigating judge in Luxembourg. It argues that the public prosecution would be in progress and the investigation would still be in course. The outcome of the criminal case would have an influence on the current proceedings. If the Court proceeded with the validation of the garnishment orders, it would permit elements that constitute criminal offences and the bringing to fruition of a fraud carried out by the STATI partners.

By invoking Article 3 of the Criminal Procedure Code, the REPUBLIC OF KAZAKHSTAN requests a stay of proceedings as regards the cases entered under roll numbers TAL-2018-03665 and TAL-2018-03667 while a decision is pending in the criminal case introduced as a result of its claim for civil damages in a criminal action, filed on 27 May 2019.

The REPUBLIC OF KAZAKHSTAN requests that the garnishments issued on 16 August 2017 and 1 December 2017 be declared null and void, otherwise inadmissible, if not unfounded, arguing that the immunity from execution, which the REPUBLIC OF KAZAKHSTAN enjoys as a sovereign state, would not have been respected. The REPUBLIC OF KAZAKHSTAN also requests that the cases entered under the roll numbers TAL-2018-03665 and TAL-2018-03667 be adjourned while the decision of the Court of Cassation is pending, following a final appeal filed against the judgment of the Luxembourg Court of Appeal of 19 December 2019.

The REPUBLIC OF KAZAKHSTAN contends that there is no current legal right allowing for the validation of seizures. According to case law of the Luxembourg Court of Appeal of 21 March 2018, "*it is possible that a garnishment carried out on the basis of a right may no longer be valid or that the execution of the right on the basis of which it was issued is no longer effective due to the occurrence of new facts*".

The REPUBLIC OF KAZAKHSTAN requests a simple discharge from the garnishments issued on 16 August 2017 and 1 December 2017.

In any event, the REPUBLIC OF KAZAKHSTAN opposes the granting of procedural compensation to the STATI partners.

In the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667, the REPUBLIC OF KAZAKHSTAN requests that the STATI partners be ordered to pay it jointly and severally, if not *in solidum*, if not each for its part, a procedural compensation of 100,000 euros on the basis of Article 240 of the New Civil Proceedings Code for each case.

The REPUBLIC OF KAZAKHSTAN requests that the costs and expenses of the case are awarded against the STATI partners, including costs claimed by the Counsel to the Court, affirming to have made the advance payment.

The STATI partners state first of all that they would have granted a discharge of the garnishment order served on the limited liability company Tengizchevroil Finance Company Sarl, which had declared, on February 2, 2018, that it was not liable for any debt owed to the REPUBLIC OF KAZAKHSTAN and did not hold any assets on its behalf.

The STATI partners dispute that there was any fraud committed in obtaining the arbitral award. They argue that in no country would any fraud have been judicially recognised. All courts before which allegations of fraud have been brought have systematically rejected this argument. They refer in this respect to the judgments of the Swedish Supreme Court of 24 October 2017, and the Rome Appeal Court of 27 February 2019, the Appeal Court of the District of Columbia of 19 April 2019, the Luxembourg Court of Appeal of 19 December

2019, as well as the judgment of the Brussels Court of First Instance of 20 December 2019.

The STATI partners state that by judgment of the Supreme Court of Sweden of 18 May 2020, the application for review brought by the REPUBLIC OF KAZAKHSTAN was rejected. The application for review was lodged in Sweden on 3 April 2020 and was based on the discovery of new evidence, which had been submitted to the Supreme Court of Sweden on 3 April 2020, namely the KPMG report and the deposition of "Mr Lungu".

The STATI partners point out that the allegations of fraud and violation of public policy contained in the REPUBLIC OF KAZAKHSTAN's submissions would have been definitively dismissed by the ruling handed down by the Luxembourg Court of Appeal in the exequatur case. The appeal filed at the Court of Cassation against this ruling by the REPUBLIC OF KAZAKHSTAN would not be suspensive and capable of modifying the Appeal Court's assessment of the facts, which would remain sovereign in the matter. With regard to these cases, the Court is requested to validate an enforcement order and should limit itself to determining the existence of a right to enforcement on Luxembourg territory. In this case, this right has existed since 19 December 2019, pursuant to which the garnishments must be validated.

The STATI partners dispute that seizures would be carried out on assets likely to be covered by immunity from execution, which would never be absolute. Moreover, the REPUBLIC OF KAZAKHSTAN has waived its right to immunity from execution by signing the ECT and by participating in the arbitration procedure.

The STATI partners oppose the request of the REPUBLIC OF KAZAKHSTAN to adjourn the cases entered under the roll numbers TAL-2018-03665 and TAL-2018-03667 pending the decision of the Luxembourg Court of Cassation, arguing that in the matter of the appeal in cassation it would not have a suspensive effect. The contested decision would therefore have to be respected, as long as it has not been annulled.

The STATI partners contest the request for a stay of proceedings lodged by the REPUBLIC OF KAZAKHSTAN on the basis of Article 3 of the Criminal Procedure Code, pointing out that the absence of any new elements relating to the content of the criminal complaint filed in the context of this litigation and the appeal against the enforcement order in Luxembourg. The enforceability of the right invoked in support of the application for validation of the garnishments would have been confirmed by the judgment of the Luxembourg Court of Appeal of 19 December 2019. In this ruling, the Appeal Court ruled that *“the allegations made by the appellant, even if they were accepted, and the fact that KPMG retracted its reports concerning the financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not of themselves sufficient to constitute a fraud undermining the very basis of the respondent’s investments in Kazakhstan, the investments having commenced well before the machinations criticised by the appellant. They are not therefore of a nature to have any bearing or influence on the competence of the Arbitral Court. (...) The appellant does not justify that the alleged fraud would have had an influence on the decision concerning liability. (...) The allegations of fraud against the Stati, even if proven, are therefore not pertinent to the Award.”* The allegations of fraud were therefore dismissed by the Luxembourg Court of Appeal. This decision to uphold the enforcement order would have the authority of *res judicata*. The Court of Appeal also held in this judgment that *“the alleged fraud and, therefore, the facts alleged to constitute the offence, do not have a direct impact on the enforcement order”*. The STATI partners submit that the outcome of the criminal proceedings in Luxembourg could not therefore have an influence on the validity of the right to enforcement presented in support of the application to validate the garnishments. The Court could not call into question the conclusions of the Luxembourg Court of Appeal, which would not be affected by the judgment number 95/20 handed down on 28 January 2020 by the Council Chamber of the Luxembourg Court of Appeal. This decision would only relate to the admissibility of the criminal complaint and would not add anything to its content, which would have been known to the Luxembourg Court of Appeal when it handed down the judgment of 19 December 2019. Finally, the STATI partners contest, in the light of the above, the risk of conflicting decisions.

The STATI partners request the provisional execution of this judgment without bond, otherwise with bond.

In the cases registered under case numbers TAL-2018-03665 and TAL-2018-03667, the STATI partners increase their claims for procedural compensation of an amount of 25,000 euros for each case.

The STATI partners oppose the request of the REPUBLIC OF KAZAKHSTAN to be simply discharged from the garnishment orders issued.

GROUNDINGS FOR THE DECISION

In view of their connection, the two cases entered under the numbers TAL-2018-03665 and TAL-2018-03667 should be joined in the interests of a better administration of justice.

By invoking Article 3 of the Criminal Procedure Code, the REPUBLIC OF KAZAKHSTAN requests a stay of proceedings as regards the cases entered under roll numbers TAL-2018-03665 and TAL-2018-03667 while a decision is pending in the criminal case introduced as a result of its claim for civil damages in a criminal action, filed on 27 May 2019.

The principle expressed by the adage “*a criminal case takes precedence over a civil case*” is public policy in the sense that a judge hearing a civil action is bound, even automatically to stay proceedings from the moment that the public prosecution is admitted if, in view of the similar nature of facts submitted before the civil and criminal courts, the decision handed down by one of the courts will inevitably have an influence on the decisions of the other. (Appeal Court, 11 May 1997 roll no. 19561)

The rule that “*a criminal case takes precedence over a civil case*” of Article 3 (2) of the Criminal Procedures Code invoked is intended to prevent any conflict between decisions rendered in civil and criminal actions in the event of a common fact. However, it does not require as a condition of application an identical object or cause, simply that the decision relating to a criminal prosecution is capable of influencing a decision to be handed down by a civil court (see Appeal Court, 4 February 1998, roll no. 15167; TAL 4 July 2012, Pas. 36, p.180).

In order for the rule "*the criminal action takes precedence over the civil action*" to apply, it is necessary that both actions are related to the same facts or, according to another formulation, that the decision taken in the criminal action can influence the decision to be taken by the civil court. The tendency of case law is to broaden the notion of identical facts. At present, case law considers that it is not necessary for there to be an identical object, parties or even cause in order for the stay to be imposed. It is sufficient that a common question pertains to both actions so that the court cannot rule without considering the offence committed and thereby avoid any risk of conflict with the criminal court (see Stéfani and Levasseur, *Procédure pénale*, no. 210; 3rd Civ. 27 May 1975, D. 1975, Inf. 213).

Article 3 (2) of the Criminal Proceedings Code provides that if the civil action is brought before the civil courts, proceedings are stayed until the prosecution action has been finally decided before or during the civil proceedings. It is in fact desirable that the criminal and civil courts, which have to deal with two actions which have their origin in the same fact, should not, as a result of the procedural differences, give different interpretations leading to contradictory judgements. It is precisely because the criminal decision, once handed down, is invested with an absolute authority which is such that the civil judge must avoid any contradiction: the civil judge must await the resulting decision to which their own judgment must conform (*Jurisclasseur Procédure pénale*: Actions resulting from criminal offences sub art. 1-5, fasc. IV no. 87).

A stay of proceedings is only necessary if there is a close enough connection between the two actions and a risk of contradiction is created between the decisions to be taken. The influence of the criminal decision on the result of the civil action must be certain or possible (*Jurisclasseur de Procédure pénale* loc. cit. no. 5 108 and 113).

In order for the rule "*the criminal action takes precedence over the civil action*" to apply, three conditions are required: 1) The public prosecution must be in progress; 2) The public prosecution and the civil action must have a close connection; 3) The public prosecution must not have resulted in a final decision (*Jurisclasseur de Procédure pénale* loc. cit. no. 96).

In this case, the REPUBLIC OF KAZAKHSTAN lodged, on 27 May 2019, a criminal complaint with civil claim for damages dated 24 May 2019 against the STATI partners before an investigating judge in Luxembourg. According

to the ordinance of the investigating judge of 29 May 2019 ordering the payment of a deposit of 1,000 euros before 5 July 2019, this amount was deposited by the REPUBLIC OF KAZAKHSTAN on 6 June 2019 at the *Caisse de Consignation*.

By ordinance of 9 October 2019, the investigating judge in Luxembourg declared that they did not have territorial jurisdiction to examine the facts of the case of the criminal complaint with civil claim for damages.

However, by a ruling number 95/20 handed down on 28 January 2020, the Counsel Chamber of the Luxembourg Court of Appeal declared that “*the investigating judge of the District Court of and in Luxembourg has territorial jurisdiction to examine the facts of the case of the criminal complaint with civil claim for damages*”.

In the light of the foregoing arguments, the public proceedings have indeed been set in motion, so that the first condition for a stay of proceedings has been met.

It is therefore necessary to examine if a close connection exists between the criminal action and the present case, creating a risk of contradiction between the decisions to be taken.

In the arbitral award, the Arbitral Court found that the REPUBLIC OF KAZAKHSTAN violated its obligations under the ECT with regard to the investments of the STATI partners and decided that the REPUBLIC OF KAZAKHSTAN should pay the STATI partners an amount of USD 497,685,101.00, plus default interest (i.e. USD 199,000,000.00 as damages for the LPG plant).

Under the terms of paragraph 1095 of the arbitral award, the Arbitral Court concluded that the REPUBLIC OF KAZAKHSTAN's measures, taken in their context and compared to the treatment of the STATI partners' investments before the order of the President of the Republic of 14/16 October 2008, constituted a series of harassment measures coordinated by various institutions of the REPUBLIC OF KAZAKHSTAN. These measures should be considered as a violation of the obligation to treat investors in a fair and equitable manner in accordance with Article 10 (1) of the ECT.

As part of its criminal complaint with civil claim for damages filed on 27 May 2019, the REPUBLIC OF KAZAKHSTAN maintains that the Arbitral Court awarded the STATI partners an amount of USD 497,685,101.00 and USD 8,975,496.40, of which USD 199 million was for the LPG plant. Several documents produced by the STATI partners in the arbitration proceedings were allegedly false, in particular the financial statements of Tristan Oil Ltd, KPM and TNG, the "Information Memorandum" and the "*KPMG Due Diligence Report*". The STATI partners allegedly presented false evidence with full knowledge of the facts to the Arbitral Court with the aim of deliberately misleading the arbitrators in order to obtain an entitlement against the REPUBLIC OF KAZAKHSTAN. The documents and information concealed by the STATI partners would have had a decisive influence on the arbitral award. The Arbitral Court would never have allowed the claims of the STATI partners, if it had knowledge of their criminal and unlawful actions at the time. The actions of the STATI partners fall under criminal law. The STATI partners would have knowingly and fraudulently misled the Arbitral Court regarding the costs of the construction of the LPG plant in order that the REPUBLIC OF KAZAKHSTAN be ordered to pay them damages and interest on damages that were never really proven. These damages would have been calculated on the basis of fictitious, if not intentionally inflated costs and investments, with the intention to defraud. They had been documented by fictitious contracts and falsified exhibits, as well as expert reports containing intellectual falsehoods, insofar as these reports would have been drafted on the basis of these same falsified documents and fictitious contracts. The arbitral award would therefore be the product of fraudulent machinations, forgeries and their use by the STATI partners in the context of garnishment and enforcement proceedings constitutes fraudulent machinations within the meaning of Article 496 of the Criminal Code. The STATI partners' use of the arbitral sentence as part of the garnishment proceedings would therefore constitute the crime of money laundering.

The STATI partners maintain that judgment number 133/19 – VIII – Exequatur of 19 December 2019 of the Luxembourg Court of Appeal confirming the enforcement order would have the authority of *res judicata*.

Judgment number 133/19 - VIII - Exequatur of 19 December 2019 of the Luxembourg Court of Appeal, handed down on appeal by the REPUBLIC OF KAZAKHSTAN against Order number 40/2017 of 30 August 2017 by which the arbitral award was declared enforceable in the Grand Duchy of Luxembourg, states that:

“For there to be conflict with public policy, the Award must have been obtained by a decisive and obvious fraud:

The burden of proof is incumbent on the party that contests the enforcement order by invoking the fraud.

(...)

In this case, the alleged fraud does not result in the decision of the Arbitral Court nor the decision of the SVEA Court (Stockholm Appeal Court) nor of the Swedish Supreme Court, nor a decision of a criminal court or of a court of another country.

Insofar as the fraud must be obvious, it is not the business of the Court, which hears the application for enforcement, to introduce measures of investigation to establish the existence of the alleged fraud.

(...)

Even if it were established, the alleged fraud would not have influenced the arbitrators’ decision regarding Kazakhstan’s liability, but would only concern a part of the damages and interests in question, in this case the damages and interest relating to the LPG factory.

(...)

If it is accepted that the judge granting the enforcement order is a civil judge in the sense of Article 3 of the Criminal Proceedings Code, the application for a stay of proceedings can only be granted if the facts reported as constituting the offence have a direct bearing on the cause of refusal of the enforcement order and the criminal decision to be taken is likely to influence the civil decision.

However, it was found in the foregoing that the alleged fraud and, hence, the facts recorded as constituting the offence, did not have a direct bearing on the enforcement order.

There is, therefore, no reason to allow a stay of proceedings”.

The authority of *res judicata* is defined as all the effects that derive from a court's decision, such as the force of legal truth (see Gérard Cornu, *Vocabulaire juridique*, PUF, 8th edition 2000, verbo autorité)

It should be stressed that the judgment of the Luxembourg Court of Appeal of 19 December 2019 does not rule out the possibility that the alleged fraud may have an influence on the damages awarded in respect of the LPG plant, which, according to the arbitral award, amount to USD 199,000,000.00.

However, the Court points out that the question of the *quantum* of damages is paramount in this case in terms of validating the garnishment orders.

It must be concluded that the principle of the authority of *res judicata* attached to Judgment number 133/19 - VIII - Exequatur of 19 December 2019 of the Luxembourg Court of Appeal does not preclude a stay of proceedings.

It should also be noted that if the STATI partners had committed the offences alleged by the REPUBLIC OF KAZAKHSTAN, that circumstance would necessarily have an impact on the application for validation of the garnishment orders issued.

In view of the foregoing arguments, there is reason to find that the criminal action and the civil action to validate the garnishment order in this case are closely connected and a risk of contradiction does exist between the decisions to be taken, such that the second condition to stay proceedings, is in this case, met.

It is clear that the public prosecution has still not been finally decided, so that the last condition to stay proceedings has also been met.

Pursuant to the foregoing arguments, there is just cause to stay the proceedings while waiting for the outcome of the criminal actions and to reserve the rights of the parties and costs

FOR THESE REASONS:

The District Court of and in Luxembourg, eleventh chamber, sitting in civil matters, ruling after hearing the parties' submissions,

orders the joinder of the cases entered under roll numbers TAL-2018-03665 and TAL-2018-03667,

stays the proceedings pending the outcome of the criminal action,

reserves the rights of the parties and costs,

adjourns the case.

Signature [illegible]

Signature [illegible]