Judgment no. 1490/2019 deposited on 27/02/2019
General Role no. 3666/2018
Catalogue no. 166/2019 of 01/03/2019

REPUBLIC OF ITALY

IN THE NAME OF THE ITALIAN PEOPLE

ROME COURT OF APPEAL

FIRST CIVIL SECTION

The Bench consisting of the following Judges

Dr Corrado Maffei	President
Dr Diego Pinto	Judge
Dr Raffaella Tronci	Judge rapporteur

Issued the following

JUDGMENT

In civil proceedings consisting of one level only pursuant to article 840, Civil Procedure Code ("CPC") enrolled under no. 3666 of the General Role of contested matters for the year 2018, reserved for decision at the hearing before the Bench of 27.2.2019 following the hearing of oral submissions pursuant to article 281 *sexies* CPC and

BETWEEN

Republic of Kazakhstan (legal counsel Daniele Geronzi and Cecilia Carrara).

PLAINTIFF [IN OPPOSITION]

AND

Stati Anatolie, Stati Gabriel, Ascom Group S.A. and Terra Raf Trans Traiding Ltd (legal counsel Michelangelo Cicogna, Silvia Doria, Chiara Caliandro, Prof. Raffaella Muroni and Andrew Garnett Paton)

DEFENDANTS [TO OPPOSITION]

MATTER: Opposition to Decree declaring the enforceability of foreign award pursuant to article 840 CPC

Judgment no. 1490/2019 deposited on 27/02/2019
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REASONS FOR THE DECISION

1. By writ of summons served on Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd on 14.5.2018, the Republic of Kazakhstan brought opposition proceedings against the Decree of the President of this Court dated 29-30.1.2018, pursuant to which the foreign arbitral award issued on 19.12.2013 at the conclusion of arbitration proceedings no. 116/2010 before the Institute of Arbitration of the Stockholm Chamber of Commerce and the subsequent *Addendum* dated 17.1.2014, were declared enforceable in Italy.

Following the appearance of the Parties, the Court, by reserved orders deposited on 13.12.2018 pursuant to article 649 CPC, rejected the application for stay of the enforceability of the award and set down the hearing date of 27.2.2019 for the filing of final applications and for oral submissions.

2. The present opposition proceedings are admissible.

The Decree, together with the application for recognition pursuant to article 839 CPC, were forwarded for service on the Republic of Kazakhstan on 12.3.2018 through two different means of service foreseen by the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, signed by the Republic of Kazakhstan on 15.10.2015 and effective in Kazakh territory from 1.6.2016.

Service had been requested pursuant both to article 8 of the Hague Convention, therefore through the Italian diplomatic representative in Kazakhstan, and to article 10 of the said Convention, that is by postal service directly to the addressee.

Service via the consular offices was not successful, whereas the receipt notice of the documents sent by means of postal service pursuant to article 10 of the Hague Convention (doc. 10, Defendants' exhibits) indicated that the documents were delivered to the addressee Republic of Kazakhstan at 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*, on 30.03.2018. Therefore, in the view of the Defendants, service of the present Opposition was out of time, having been effected after the term of 30 days had elapsed.

The Court however considers that the service referred to above did not comply with the provisions of article 10 of the Convention because the documents were addressed to the Central Authority which, pursuant to articles 3 and 6, has the duty to receive applications for service or for communication coming from another contracting State and to deal with such applications (article 2, Convention). The Central Authority is certainly involved in the service of documents carried out in accordance with the methods foreseen by article 3-6 of

the Convention, but it is entirely extraneous to service pursuant to article 10 which provides for the possibility of service by post.

It follows that the documents should have been addressed to the Republic of Kazakhstan in the person of the Minister of Justice of the Republic of Kazakhstan, being the only person under Kazakh law with power to receive judicial documents in the name and on behalf of the Kazakh Republic (see document 40, Plaintiff's exhibits) and not, instead, to the Central Authority (*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*).

It follows that the submissions of the Plaintiff with regard to the commencement of the running of time for the presentation of the opposition are well made, as the Plaintiff has documented that the Department of the Supreme Court – having received the documents erroneously sent to it – took steps to send the documents on to the correct addressee, that is, to the Ministry for Justice and the documents were materially delivered on 26.4.2018 to an employee of the Ministry who signed them for receipt (Mr. Mukhanov, Bolat Omirzhanovitch, employee at the Department of the Ministry for Justice; see docs 1 and 42).

In this kind of proceeding, the rules governing opposition proceedings to injunctive decrees are applicable where compatible, as referred to in article 840, paragraph 2, CPC. and therefore "for the purposes of the admissibility of a late opposition to an injunctive decree, it is necessary for the plaintiff [opposing the decree] to show that, because service was not effected correctly, it received "untimely" notice of the proceedings, having had knowledge of the proceedings only after the term for the presentation of a timely opposition to them or, alternatively, at a time in which the opposition could not have been properly prepared and presented: the onus of proof can be satisfied by reference to presumptions and, in particular, as it is a negative fact, through the demonstration of a positive fact, that is, of exactly how and when the plaintiff became aware of the orders" (Supreme Court of Cassation no. 25391/2017; see also Supreme Court of Cassation 20850/2018).

3. The opposition however is unfounded.

The Plaintiff in Opposition, by reference to the award the subject of the *exequatur* pursuant to which the Republic of Kazakhstan was ordered to pay the sum of $ 497,685,101.00 in favour of the Defendants in these proceedings, submitted in support of its opposition the following arguments:

1) That only after the conclusion of the arbitration proceedings did the Republic of Kazakhstan become aware that the award was "*…rendered on the basis of false evidence and testimony…within the ambit of a wider fraudulent scheme…"* and, consequently, contained provisions that are in contrast with domestic public policy;
2) That the Arbitral Tribunal did not have jurisdiction to hear the dispute because there was no valid arbitration clause;
3) That the constitution of the Arbitral Tribunal did not take place in compliance with the agreement of the parties.

With respect to the first grievance of the Plaintiff, that is, the alleged breach of public policy (article 840, second last paragraph, *sub* no. 2, CPC), the Court notes that, for the purposes of the compatibility of an award with the domestic legal system, regard must be had to the object of the award which, in this case, consists in an order for the payment of damages for breaches by the Plaintiff State of its obligations arising under the Energy Charter Treaty in relation to investments made by the Defendants in these proceedings. It is noted, in fact, that pursuant to article 840 CPC a review of compatibility with public policy cannot regard the reasoning of the entire arbitral award but only the final orders in the award.

It is useful to recall that a review of a foreign judgment in recognition proceedings does not concern the correctness of the decision adopted in application of the foreign legal system but rather consists of a verification of the compatibility of the "effects" of the decision with the Italian legal system. It is necessary therefore to decide if these effects are abnormal to our legal system because they are in open contradiction with the web of values and laws that govern the matter (see Supreme Court of Cassation in plenary session, no. 16601/2017).

Nor does there appear to be any conflict with procedural public order, given that nothing has emerged showing a *manifest or excessive breach of the rights of the parties to rights of due process and of defence* (see most recently the plenary session of the Supreme Court of Cassation with regard to its review of the Court of Appeal in connection with the recognition of a foreign judgment regarding the respect of the fundamental principles of the legal system, also including the procedures followed giving rise to the decision or, in other words, procedural public order (see Supreme Court of Cassation, plenary session, no. 16601/2017, at paragraph 2.2 of the reasons).

Furthermore, for what concerns the alleged *defect giving rise to a revocation* of the foreign arbitral award – assuming that such defect is relevant to these proceedings – it appears from the documentation forming part of the proceedings that both the Stockholm Court of Appeal and the Swedish Supreme Court, in the application brought before them to set aside the award, considered arguments that substantially fall within the grounds relied on before this Court (see the judgment issued in the Swedish proceedings to set aside, at page 8, docs 5 and 5-*bis* for the relevant English translation, file of *exequatur* proceedings) that were decided against the Plaintiff in these proceedings, substantially showing the irrelevance for the purposes of the decision of the alleged fraudulent conduct of Anatoli Stati and Gabriel Stati. In any case, the alleged false evidence on which the award is alleged to have been based is not contained in any *res judicata* judgment (article 395 no. 2 CPC).

Equally unfounded is the second ground of challenge.

The arbitration clause pursuant to which the arbitration proceeded and which gave rise to the Award and to the Addendum) is to be found in article 26 of the Energy Charter Treaty. This clause provides as follows: *"1. Disputes between a Contracting Party and an Investor of another Contracting Party relating to an investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under part III shall, if possible, be settled amicably. 2. If such disputes cannot be settled according to the provisions of paragraph 1 within a period of three months from the date on which either party to the*

dispute requested amicable settlement, the Investor Party to the dispute may choose to submit it for resolution : a) to the courts or administrative tribunals of the Contracting Party to the dispute; b) in accordance with any applicable agreed dispute settlement procedure; or c) in accordance with the following paragraphs of this Article. 3.a) Subject only to sub-paragraphs b) and c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. …".

The Plaintiff alleged, relying on article 840, para 3, no. 2 CPC , that the Arbitral Tribunal did not have jurisdiction to decide the dispute between the Parties, in that the period of 3 months provided by article 26.2 of the EC Treaty to carry out an attempt of amicable resolution of the dispute was not respected by the Defendants, although it was a necessary condition for the validity of the arbitration clause. The alleged breach does not appear to fall within the provisions of article 840, para 3, no. 2, which attributes importance to a situation in which a party, against whom an award is relied on, *was not informed of the appointment of an arbitrator or of the arbitral proceedings or, in any case, did not have the opportunity to properly present its defence in the proceedings.* These hypotheses do not appear relevant here. In any case the question, already raised in the application for setting aside of the Award, was rejected by the Swedish Court of Appeal for the reason, which this court shares, that the article in question does not impose, as a condition of the validity of the arbitration clause, a requirement that the term of 3 months has expired.

Accordingly, the jurisdiction of the arbitrators cannot correctly be denied based on the allegation in question.

The third ground of Opposition asserts that the constitution of the arbitral tribunal was not done in accordance with the agreement of the Parties.

Also this grievance is unfounded.

The Plaintiff claims that the constitution of the Arbitral Tribunal was not carried out in compliance with the agreement of the Parties, submitting that the Republic of Kazakhstan was not able to appoint its own arbitrator, with the consequence that the Award cannot be recognised due to the existence of an impeding circumstance pursuant to article 840, para 3, no. 4 CPC in that the appointment of the arbitral panel was not carried out in accordance with the agreement of the Parties.

The grievance is unfounded.

It emerges from the documentation of the arbitration proceedings that, on 26.7.2010, the Defendants in these proceedings filed with the Arbitration Institute of the Stockholm Chamber of Commerce a request for arbitration pursuant to article 2 of the Rules of the Arbitration Institute, appointing its own arbitrator and, at the same time, proposing that the two arbitrators respectively appointed by the parties appoint the President of the Arbitral Tribunal. On 3.8.2010, the Arbitration Institute received the request and, as foreseen by the Rules, on 5.8.2010, sent a copy to the Republic of Kazakhstan together with the Rules adopted by the Parties – which provided that the Respondent appoint its own arbitrator – that

was received on 9.8.2010 (see doc. 31, Plaintiff's exhibit). In its notice, the Arbitration Institute requested a reply by the 26.8.2010. On 27.8.2010, the Republic of Kazakhstan had not yet sent any reply to the notice of the Institute and had not appointed its own arbitrator. Accordingly, the Arbitration Institute extended the aforementioned term for reply until 10.9.2010, informing the party by notice received by the Ministry of Justice on 31.8.2010. The Arbitration Institute specified in this latter notice that a failure to reply by the Republic of Kazakhstan would not have prevented the arbitration commenced by Messrs Stati from proceeding normally. However, the Republic of Kazakhstan did not reply to the notice so that, on 13.9.2010, the Defendants in these proceedings requested that the arbitrator to be appointed by the Republic of Kazakhstan should be effected by the Arbitration Institute pursuant to article 13.3 of the Rules, in order to allow the proceedings to continue and to protect their rights. The request was sent by registered post to the other party which confirmed receipt of the notice on 23.9.2010. On 20.9.2010, therefore, after a period of 42 days had elapsed from receipt by the Republic of Kazakhstan of the copy of the request for arbitration by the Defendants and in light of the inaction of the Republic of Kazakhstan, the Arbitration Institute, in substitution of the other party, appointed Professor Lebedev as member of the Arbitral Tribunal and the Institute notified the Parties of the appointment on 23.9.2010 (see Doc. 35 Plaintiff's exhibits). On 27.9.2010, in the exercise of its own powers, the Institute appointed Prof. Karl Heinz Boeckstiegel as President of the Arbitral Tribunal and, on 28.9.2010, notified the Parties of this. The Republic of Kazakhstan received the notice on 1.10.2010. Only on 8.11.2010, the law firm Curtis Mallet-Prevost, on behalf of the Plaintiff, contested the appointment of the arbitrator.

The summary as set out here shows that the appointment of the arbitral panel was carried out in accordance with the terms of the arbitration agreement and of the Rules of the Arbitration Institute referred to therein.

The grievances, already rejected also by the Arbitration Institute first and then by the Swedish Court of Appeal, are therefore without merit.

In light of the above considerations, the further procedural applications made by the Plaintiff at the hearing today are irrelevant.

All things considered, the Opposition must be rejected.

The legal costs follow the event and are quantified in the orders.

FOR THESE REASONS

The Court makes the following orders:

1) Rejects the Opposition presented by the Republic of Kazakhstan against the Decree of the President of this Court dated 29-30.1.2018 pursuant to which the foreign Arbitral Award, issued on 19.12.2013 and decided at the conclusion of Arbitration Proceedings no. 116/2010 before the Arbitration Institute of the Stockholm Chamber of Commerce and the subsequent *Addendum* dated 17.1.2014 were declared enforceable in Italy;

2) Orders the Republic of Kazakhstan to pay the legal costs of these proceedings in favour of Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. which are quantified for the total sum of € 120,000.00 for fees, general expenses, social security levies and VAT.

Rome, 27.2.2019 President

Judge rapporteur [sgd]

[sgd]

Deposited and read at the hearing

[27.2.2019]

[sgd]

[Stamp] Judicial Assistant

Dr. Stefania Cipolla