

Kazakhstan v Stati: Brussels Court of Appeals refuses exequatur for award obtained by fraud and rules on impact of foreign annulment and exequatur judgments (Brussels Court of Appeal)

by *Practical Law Arbitration*, with *Strelia*

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In *Republic of Kazakhstan v Stati consorts, Ascom Group SA and Terra Raf Trans Trading Ltd (Case No 2020/AR/252) (16 November 2021)*, the Brussels Court of Appeals refused exequatur of an arbitral award on the grounds of fraud. The court also clarified that it can make its own decision on exequatur regardless of any foreign court judgments on annulment and exequatur of the same award.

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The Brussels Court of Appeals has ruled that an award cannot be granted exequatur in Belgium if it has been obtained by fraud. Here, false evidence was used in the arbitral proceedings in order to alter the arbitral tribunal's decision on the merits of the case and the award was influenced by that information. However, the court also suggested that a lower standard of fraud might be relevant in some circumstances.

The Brussels Court of Appeals also found that, in proceedings regarding recognition and enforcement of arbitral awards, it has a duty to examine the grounds for refusal and enforcement but should not be influenced by any foreign courts' decisions on the (non-)annulment or exequatur of those awards.

The courts' decision is important both for Belgian and international arbitration law, as it is one of the few cases that deals with fraud in arbitration and on the *res iudicata* effect of foreign court judgments in post-award proceedings. (*Republic of Kazakhstan v Stati consorts, Ascom Group SA and Terra Raf Trans Trading Ltd (Case No 2020/AR/252) (16 November 2021)*.)

Background

Arbitral awards obtained by fraud violate public policy and cannot be granted exequatur in Belgium (Article 1721 (b) (ii) of the Belgian Judicial Code (BJC) and Article V section 2(b) of the New York Convention). Until 2013, a previous version of the BJC applied, which provided that arbitral awards obtained by fraud constituted a separate review ground (under Article 1723 and Article 1704 (section 3)(a)). The old BJC formed the basis of the Brussels court's decision here.

Belgian law does not include any clear guidance as to whether the court considering exequatur must rely on foreign courts' rulings and findings as to exequatur and (non-)annulment of an award. Few Belgian authors have considered this scenario, focusing primarily on the effects of the annulled award on the exequatur ruling (an annulled award would not be enforced in Belgium, except when the annulment decision violates Belgian public policy). Also, foreign court decisions on non-annulment do not entail exequatur automatically.

Facts

In its 2013 arbitral award, an SCC arbitral tribunal ruled that Kazakhstan breached the Energy Charter Treaty having taken measures in relation to investments made by the Stati parties. The arbitral tribunal ordered Kazakhstan to pay over \$500 million to the Stati parties.

Kazakhstan has always alleged that the Stati parties committed fraud in relation to their investments. However, that fraud has (to date) never been proven or retained.

Kazakhstan sought to have the SCC award annulled in 2016 and in 2020 before the Svea Court of Appeal and the Swedish Supreme Court but was not successful on procedural grounds. In the Swedish proceedings, Kazakhstan advanced arguments of the alleged fraud but the substance of these arguments was not ruled on.

Kazakhstan subsequently sought to oppose the enforcement of the SCC award in various jurisdictions. It was not successful in the US or Italy. However, it was partly successful in the UK, where the English Commercial Court accepted that there was *prima facie* evidence of fraud but allowed the Stati parties to discontinue the proceedings (see [Legal update, Notice of discontinuance of claim to enforce arbitration award set aside \(Commercial Court\)](#)). However, the English Court of Appeal subsequently allowed an appeal against that first instance decision to set aside a notice of discontinuance (see [Legal update, Court allows discontinuance of enforcement proceedings in respect of foreign arbitral award \(Court of Appeal\)](#)). Kazakhstan's applications to deny enforcement of the awards are still being considered before the Luxembourg and Dutch courts.

On 11 December 2017, the SCC award was granted exequatur by the Brussels Court of First Instance, in *ex parte* proceedings. Kazakhstan filed a third-party opposition against this decision, which led to subsequent adversary proceedings before the same Brussels Court of First Instance. That court confirmed its exequatur decision on 20 December 2019, against which Kazakhstan filed an appeal on 17 February 2020. In the exequatur proceedings, Kazakhstan has always argued that fraud took place.

However, it was only in late 2019 when new revelations came to light and were filed in court as evidence, in particular the Stati parties' auditors' decision to immediately take all necessary measures to prevent any credit being given to their audit reports. Also, new witness affidavits of a key person were filed.

Decision

The Brussels Court of Appeals refused to grant exequatur, finding that the award had been influenced by fraud.

The Brussels court first defined what constitutes fraud that justifies the refusal of recognition and enforcement of an arbitral award. The court ruled that an award must be considered as based on evidence recognised as false if that evidence influenced the arbitral tribunal's decision. Fraud exists if the arbitral tribunal was induced to make an erroneous decision in the sense that it was misled by a party, by making a dishonest declaration or by concealing an important fact so that the arbitral tribunal was not informed properly.

An arbitral award will be obtained by fraud if the declaration or omission impacts the arbitral award, which would not have been pronounced in the same way without the fraud. However, according to the court the fraud does not have to be the "determining ground" for the arbitral award; such a requirement is not founded on any legal basis under Belgian law.

On the facts of this case, the Brussels court found, among other things, that the Stati parties deliberately withheld information about the true value of their investment in Kazakhstan. In particular, the Stati parties deliberately presented one party (Perkwood) as a third party, while in reality it was an affiliated company, for the sole purpose of misrepresenting the information reflected in another party's (TNG's) financial statements and for the purpose of avoiding the necessity of obtaining an independent opinion concerning those financial statements. By withholding the information, the Stati parties deceived the auditors who, in 2019, informed Kazakhstan and the Stati parties that no credibility should be given to the audit reports and insisted that any and all measures should be taken to ensure that no credit would be given to those reports.

The court considered that, had the tribunal been aware that the evidence submitted by the Stati parties in the arbitration was based on financial statements that included major inaccuracies and omissions, the tribunal would have at least given Kazakhstan a chance to submit its arguments on this issue. These arguments would then, in turn, have been discussed in the award, which would have not been pronounced in the same manner. Accordingly, the evidence discovered after the notification of the award would necessarily have had a fundamental impact on that award. Moreover, the tribunal had rendered its decision on the causation and the quantum based on the financial statements, which proved not to have reflected the actual financial situation of the company at stake.

In reaching its decision concerning the fraud, the Brussels court had to consider what weight, if any, it would attach to the (non-)annulment decisions rendered by the Swedish courts and to decisions rendered in other jurisdictions regarding exequatur of the arbitral award. The court ruled, as a matter of principle, that it is not bound by a foreign (non-)annulment decision, since such a decision does not render an award automatically enforceable in Belgium and it does not deprive the Belgian courts from their proper obligation to investigate whether grounds for refusal of exequatur exist, and this is particularly so with regards to public policy. Furthermore, the foreign decisions were rendered on purely procedural grounds and could not have considered new evidence that came into light only after the annulment proceedings. The court is also not bound by foreign court's decisions on refusal of exequatur, nor by decisions granting it.

In the specific circumstances of the case, the Brussels court decided to disregard the Swedish non-annulment decisions, by ruling that those decisions were rendered without considering the new evidence that came to light only in 2019. The Brussels court did find a way to salute some courts' sympathy for the fraud allegation (the UK court which had accepted the prima facie fraud allegations with reference to the 2019 documents and the Luxembourg Court of Cassation which quashed the lower court's judgment and obliged it to take the new evidence into account), and to nuance the other courts' (the Dutch and US) reluctance to do so (although the Dutch proceedings are pending, the public prosecutor with that court has recommended reversing the exequatur decision and the US courts refused to examine the fraud allegations).

Comment

Regardless of the obvious interest to the international arbitration community, which has been captivated by the Stati/Kazakhstan saga for several years now, the judgment also offers valuable insights into the Belgian law approach to fraud in arbitration. Also, it sheds light on the Belgian courts' approach to the impact of international (non-)annulment and exequatur decisions on Belgian exequatur courts' own scope of review.

The Brussels court is the first Belgian court to have ruled on fraud as a ground for the refusal of exequatur of an arbitral award. The court has considered, in thorough and explicit language, what could constitute fraud under Belgian law standards and justify the refusal of exequatur. Admittedly, in a detailed reasoning, the Brussels court considered that the arbitral award was influenced by fraud where the arbitrators, in their decision on the causation and quantum, relied on evidence that subsequently proved to be false. However, the court seemed also to accept that, in order to conclude that the award was obtained by fraud, it would suffice for the false evidence to influence, one way or the other, the tribunal's decision, or that the fraudulent actions had a certain impact on the arbitral award, which would have not been pronounced in the same way without the fraud.

Importantly, the court ruled that the connection between the fraud and the award did not have to be determinant. Here the parties deliberately withheld information and deceived the auditors, and subsequently the tribunal, about the true value of their investment and thereby deprived the other party from the opportunity to comment on the actual facts. The impossibility of the other party to formulate its arguments about the actual facts altered the award because the tribunal could not address such arguments (which could not have been put forth).

As demonstrated by international case law, instances where arbitral awards have been annulled or refused exequatur because of fraud allegations are extremely rare. Fraud is, in itself, a rare occurrence. Instances where fraud has been found to have sufficiently impacted the award so as to justify its annulment or refusal of exequatur, occur even less often. Among others, Swiss, German, US, English and French courts have considered whether false testimony or evidence submitted in arbitral proceedings did mislead the arbitrators (on a key) part of their reasoning and therefore had an influence on the arbitral tribunal's decision.

The Brussels court has now expressed its views about the impact of foreign (non-)annulment and exequatur decisions on the Belgian courts' competence to verify on its own whether any reasons justified refusal of exequatur. Few courts internationally had ruled explicitly on this issue.

The Brussels court's reasoning on the issue was unfortunately not extensive. It was largely guided by the specific circumstances of the case, namely by evidence of fraud that came to light long after the arbitral award had been rendered and after some foreign courts had rendered their (non-)annulment or exequatur decisions. The court has confirmed, in line with what seems the predominant view, that it is not bound by those other courts' rulings as to (non-)annulment or exequatur. The annulment ruling has a different subject matter than exequatur, and so do various exequatur rulings, as their effects are limited to the specific exequatur states' and might involve potentially various legal issues. However, the Brussels court steered away from a clear analysis as to whether it would be bound by the other courts' findings on certain exequatur refusal grounds. Rather, the court relied largely on the fact that the relevant evidence was new and did not form part of the debate before the other courts in order to arrive to a fact-based conclusion of its own about the violation of public policy.

The Brussels court judgment is, therefore, not only important for the local practitioners, but forms an equally valuable contribution to international arbitration law.

Case

Republic of Kazakhstan v Stati consorts, Ascom Group SA and Terra Raf Trans Traiding Ltd (Case No 2020/AR/252) (16 November 2021). (Only available in French.)

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