**FRENCH REPUBLIC**
IN THE NAME OF THE FRENCH REPUBLIC

**COURT OF APPEALS OF PARIS**

**International Chamber of Commerce**
**Pole 5 - Chamber 16**

**ORDER OF 03 JUNE 2020**

APPEAL FOR ANNULMENT OF

(no. 21 /2020, pages)

Registration number in the general directory: **NO. RG 19/07261 - Portalis no. 35L7-V-B7D-B7VDG**

**Decision referred to the Court**: arbitral award given on 27 December 2018 in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce (Case no. ), by an arbitration court composed of Mr. (B), President, Mr. (T) and Mr. G., Co-arbitrators.

**APPELANT:**

**SA T. (earlier known as S. ),**
Registered at the companies registry of Paris under the no.
Having its registered office at: (...)
Acting through its legal representatives,

*Represented by Me (...), lawyer at the Bar Council of Paris, having as its pleading lawyer Me (...), lawyer at the Bar Council of Paris:*

**RESPONDENT:**

**The company known as N.**
An Iranian company,
Having its registered office at (...)
Acting through its legal representatives,

*Represented by Me (...), lawyer at the Bar Council of Paris, having as its pleading lawyer Me (...) and Me (...), lawyers at the Bar Council of Paris:*

**COMPOSITION OF THE COURT:**

The matter was argued on 02 March 2020, during a public hearing, before the Court composed of:

Mr. François ANCEL, President

Mrs Fabienne SCHALLER, Counsellor

Mr. Jean LECAROZ, Counsellor called from another chamber,

who deliberated, as a report was presented at the hearing by Mr. François ANCEL under the terms stipulated in Article 785 of the Civil Procedure Code.

**Court Clerk,** during the arguments: Ms Clémentine GLEMET

**ORDER:**

- ADVERSARIAL

- by making available of the order to the Court Clerk, initially planned on 21 April 2020 and then postponed to 3 June 2020, the parties having been informed thereof beforehand under the terms stipulated in the second paragraph of Article 450 of the Civil Procedure Code.

- signed by François ANCEL, President and by Clémentine GLEMET, Court Clerk to whom the original was handed by the signing magistrate.

## I- FACTS AND PROCEEDINGS

1. The company T. (earlier known as S. Hereinafter referred to as "the company T."), is a company incorporated under the French law having its main activity in engineering in the fields of manufacturing, distribution, packaging, transport and storage of natural gas.

2. The company N. (hereinafter referred to as "the company N.") is an Iranian company active in the field of storage of natural gas which is successor in interest of the company I (hereinafter referred to as "the company I") and the company C. (hereinafter referred to as "the company C").

3. On 6 March 2002, the company S. (that became "T.") and the company I. concluded a contract number , governed by the laws of the Islamic Republic of Iran, for the conversion of the gas field Yort-E-Shah located at about 70 km from Teheran in Iran, into underground storage. This contract includes an arbitration clause in its Article 34.

4. In 2004, the rights and obligations of the company I. under this contract were transferred to the company C., who assigned them to the company N. in 2007.

5. The project was supposed to be executed in three phases: The first phase ("Phase 1"), consisted in an additional exploration. The second phase ("Phase 2"), consisted in an in-depth development and a detailed designing of the installations. The third phase ("Phase 3"), consisted notably in the supervision of the construction of the installations on the surface.

6. On 20 December 2004, an "amendment to the contract no. xx" was concluded between the parties and the company P. (hereinafter referred to as "P."), an Iranian engineering company, the Iranian legislation imposes to grant at least 51 % of the contract to an Iranian co-contractor.

7. The contract provided for a mechanism of payment made by means of a letter of credit denominated in US dollars, the Bank of Industry and Mine (hereinafter referred to as the BIM Bank), an Iranian bank, issued on 14 March 2005 a letter of credit in favour of the company T. for the amount corresponding to the overall cost of the contract with payment of an advance of 10% of the overall price of the contract. This letter of credit expired on 30 April 2008.

8. In order to ensure the performance of this contract, BIM Bank also issued on 20 October and 12 November 2005, on the instructions and on behalf of the company S. (that became T.), in favour of the contracting owner, a guarantee of refund of the advance and a guarantee of performance. These guarantees were counter guaranteed under the same terms by Natexis bank.

9. Some issues arose between the parties during the implementation of the phase 1 of the contract and the company T. informed the company N. on 27 May 2008 of the refusal of the banks to extend the bank guarantees for the performance of phases 2 and 3 of the litigious contract.

10. By letter of 27 June 2008, the company T. proposed to the company N. to mutually put an end to the litigious contract and to its amendment and to enter into a new contract denominated in Euros and deleting the obligation for it to provide a bank guarantee.

11. The company N., invoking a breach and violation of the contract and a delay in the continuation and completion of the project, notified on 26 August 2008 to the company T. the termination of the contract, as from 25 September 2008.

12. After the termination of the contract, the guarantees were called from the BIM Bank, who in turn, called for the counter guarantees on 29 August 2008.

13. Considering these calls as manifestly unlawful and abusive, the company S. (that became T.) brought an action under summary proceedings against the company N., BIM Bank and Natixis in order to refrain them from paying.

14. By order of 10 December 2009, the president of the Commercial Court of Paris granted this request. This decision was overturned by the Court of Appeals of Paris by order of 7 June 2011, and the Court of Cassation dismissed the appeal by order of 12 March 2013.

15. On 16 January 2014, the company T. filed an application for arbitration against the company N. at the International Chamber of Commerce (CCI) in order to get the termination of the contract by the company N. declared as unjustified and abusive and to say that this company was not entitled to retain the funds corresponding to the guarantee of refund of the advance and the guarantee of performance and to convict the company N. for the payment of various sums for an overall amount of 17,476,302 Euros under unpaid invoices, additional costs incurred in relation with the execution of the Project and other costs, notably relating to the encashed bank guarantees.

16. The company N. made various counterclaims during the arbitration procedure.

17. By an award (Case No. xx) given in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce on 27 December 2018, the arbitration court, composed of Mr. (B), president, and Mr. T. and Mr. G., co-arbitrators, ruled that:

- The requests of the company N. aiming to obtain the payment of the costs incurred for reconditioning of the Well (x) 4 are admissible;

- The company T. is entitled to the following amounts:
  - 1,017,068.49 USD under Advance for the works carried out;
  - 1,423,444.88 USD under an outstanding invoice;

- The company N. is entitled to the following amounts:
  - 4,217,328.51 USD under balance of the Guarantee for refund of the advance after deduction of the amount of the Advance for the works carried out;
  - 5,177,189 USD for the costs related to replacement of the Well (x)5;
  - 1,951,630 USD for the costs related to reconditioning of the Well (x)4;
  - 676,056 USD under penalty for delay;

- The company N. is entitled to compensate all the sums that are owed to it with the amount of 4,217,328.50 USD retained by the company N. under the Guarantee for refund of the advance and with the amount of 5,434,320.95 USD retained by the company N. under the Performance Guarantee;

- After having compensated the amounts mentioned above, the company T. shall pay the company N. a balance of 947,032.18 USD;

- The company T. shall:
  - Bear 70 % of the arbitration costs;
  - Reimburse the company N. an amount of 63,000 EUR as arbitration costs of the ICC;
  - Reimburse the company N. an amount of 330,000 EUR as lawyer's fees and other costs incurred by the company N. in th framework of the arbitration.

18- On 2 April 2019, the company T. filed an appeal for annulment of this conviction.

19- The matter was redistributed on 17 April 2019 to the International Chamber of Commerce, the hearing was fixed on 2 March 2020.

20- The parties gave their consent to apply the protocol of procedure applicable before this chamber.

21- The closing was pronounced on 18 February 2020 by the civil procedure judge.

## II- CLAIMS OF THE PARTIES

22- **Under the terms of the latest recapitulative pleadings notified by electronic means on 14 January 2020, the company T.** requests the court, notably on the basis of international provisions and the United Nations Security Council Resolution no. 1737 of 23 December 2006 and no. 1747 of 24 March 2007, European provisions and notably the Council Regulation (EC) no. 423/2007 of 19 April 2007 concerning the adoption of restrictive measures against Iran, the Council Regulation (EU) no. 961/2010 of 25 October 2010 concerning the adoption of restrictive measures against Iran and the Council Regulation (EU) no. 267/2012 of 23 March 2012 concerning the adoption of restrictive measures against Iran and Articles 1520, 2°, 3°, 4° and 5° of the Civil Procedure Code, to:

- Quash the arbitration award rendered in Paris on 27 December 2018 by the arbitration court under the aegis of the International Court of Arbitration of the International Chamber of Commerce, composed of Mr. (B), President, Mr. (T) and Mr. G., Co-arbitrators in the CCI matter no. xx;

- Dismiss all the requests of the company N.;

- Convict the company N. for the au payment of the sum of 100,000 EUR to T. under Article 700 of the Civil Procedure Code;

- Convict the company N. for legal costs, as these can be directly recovered by Me (...), lawyer at the Court of Appeals of Paris, under Article 699 of the Civil Procedure Code.

23- **Under its latest recapitulative pleadings notified on 14 February 2020 the company N.** request the Court, notably under Articles 1466, 1482, 1506, 1520, 1527 of the Civil Procedure Code to:

- Say that the arbitration court has ruled que le arbitration court ruled in compliance with the assignment that was entrusted to it;

- As a consequence, dismiss the request aiming to quash the Award for violation by the arbitration court of the assignment that was entrusted to it;

- Say that the acknowledgement and enforcement of the award are not contrary to international public policy;

- As a consequence, dismiss the request aiming to quash the Award because its acknowledgement would be against international public policy;

- Say that the principle of adversarial proceeding was respected;

- As a consequence, dismiss the request aiming to quash the Award for violation of the principle of adversarial proceeding;

- Grant enforcement of the Award,

In any case,

- Dismiss all the requests and claims of the company T.;

- Convict the company T. to pay to the company N., the sum of 100,000 Euros under Article 700 of the Civil Procedure Code;

- Convict the company T. for legal costs.

24- The Court refers, for a detailed exposé of the facts and claims of the parties, to

the decision taken and the pleadings referred to above, under the provisions of Article 455 of the Civil Procedure Code.

## III- GROUNDS OF THE DECISION

***On the first allegation that the arbitration court breached its assignment that was entrusted to it (Article 1520, 3° of the Civil Procedure Code):***

25- The company T. reminds that the arbitration court that does not state reasons for its award disregards the terms of its assignment, the obligation to state reasons results from the French law applicable to the proceeding as the law of the place of arbitration as well as the ICC Regulation of 2012 in its Article 31. The company T. claims that in this case the award does not state any reason concerning the question of international sanctions in spite of the fact that it raised this question in its pleadings and that the question of performance of the contract and its termination was presented in the Terms of Reference and argued considering the existence of international sanctions with respect to Iranian entities. It considers that even if the arbitration court had considered that these questions were not important or even relevant, it should have explained the reason for such conclusion and thus considers that the absence of reason concerning the question of international sanctions characterises a violation by the arbitration court of its assignment.

26- In response, the company N. argues that the obligation of reasons does not impose on the arbitration court to respond to all the arguments raised by the parties but imposes on it only to respond to the various requests made. It states that the arbitration court responded to all the requests of the parties and that it was not necessary to examine the question of application of international sanctions since it considered that the causes for termination of the contract were to be found in the non-performance by the company T. of its obligations. It specifies in this regard that the company T. did not make any request in the statement of its claims, aiming to declare the contract as void for violation of international sanctions and concludes that the question of application of international sanctions was not presented to it, the arbitration court was not liable to refer to it and that it ruled in compliance with its assignment.

Therefore,

27- As the parties chose Paris (France) as the place of arbitration, the French law is applicable to the proceeding.

28- As per Article 1482 of the Civil Procedure Code, made applicable in matter of international arbitration by Article 1506, 4° of the same code, "The arbitral award briefly stated the respective claims of the parties and their arguments. It states reasons".

29- Moreover, Article 31 of the ICC regulation of 2012, applicable to the arbitral case, stipulates that "the award must state reasons".

30- It is therefore for the arbitration court in this case to gives reasons for its award in the framework of the assignment that was entrusted to it, which is limited mainly by the subject matter of the litigation, as it is determined by the claims of the parties.

31- In this regard, the company T. requested to the arbitration court to "declare that the termination of the contract by N. [was] unjustified and abusive", that "N. was not entitled to retaining the funds corresponding to the Guarantee for refund of the advance and the performance guarantee, nor the counter guarantees" and to "declare that T. [was] entitled to the amount of the advance corresponding to the works carried out" by arguing, amongst other things, on the difficulties resulting from the sanctions taken against Iran, and also requesting the conviction of the company N. for payment of various sums for outstanding invoices, additional works, bank guarantees and arbitration costs.

32- It must be noted that the arbitration court examined each of the claims of the company T. and first the unjustified nature of the termination of the contract alleged in paragraphs 314 to 446 of the award and considered that the company T. had "not executed the List of Works subject matter of the Phase 1 while arguing that this Phase 1 was completed" and that it "was in breach of contract because all of the works and services of the Phase 1 were not realised, considering that for this reason the Respondent was justified in terminating the contract under 17.3 of the General Conditions of the contract".

33- Then, the arbitration court studied the requests of the company T. concerning the calls in guarantee in paragraphs 447 to 486 of the award, on the financial charge relating to bank guarantees in its paragraphs 487 to 495, on the request relating to the additional works carried out on the well YS5 in its paragraphs 528 to 560, on the request relating to additional works carried out from 15 June 2007 to 26 August 2008 in its paragraphs 561 to 572, on the request relating to the costs incurred after the termination under its paragraphs 573 to 587, and on the requests for compensation made by the parties in its paragraphs 707 to 764, including the cost responsibility for arbitration costs.

34- It appears from it that the award effectively states reasons on each of the requests that were made by the company T. it being reiterated that on the one hand, it does not lie within the assignment of the judge of validity of the award to control the content of the reasons of the arbitral decision, neither its persuasiveness, but only the existence thereof, and that on the other hand, the arbitrators are not obliged to follow the parties in the details of their arguments such that they have not disregarded their assignment by not ruling on the question of international sanctions and on their incidence on the performance of the contract having considered

implicitly but necessarily that this argument was neither relevant nor necessary to the resolution of the dispute regarding non performance by the company T. of its obligations other than those related to financial guarantees.

35- The argument must therefore be dismissed.

***On the argument that the acknowledgment or implementation of the award is contrary to the international public policy (1520, 5° of the Civil Procedure Code)*:**

36- **The company T.** argues that the international sanctions are mandatory laws which are part of the international public policy and that failure by the arbitration court to integrate the provisions regarding international sanctions against Iran in the award, it has given effect to a contract that is subject matter of international sanctions such that this award, which cannot be implemented without breaching these sanctions, is contrary to the French international public policy.

37- The company T. argued that in addition to the sanctions taken by the American authorities, since 2006, the United Nations Security Council adopted the resolutions constituting embargo measures against Iran and notably the United Nations Security Council Resolutions no. 1737 of 23 December 2006, no. 1747 of 24 March 2007 and no. 1803 of 3 March 2008, as well as the European Union under (EC) Regulations no. 423/2007 of 19 April 2007, Council Regulation (EU) no. 961/2010 of 25 October 2010 and Council Regulation (EU) no. 267/2012 of 23 March 2012 concerning the adoption of restrictive measures against Iran, which applies to the gas sector and money transfer operations with Iran.

38- It specifies that these sanctions have introduced an embargo on exports and other services to Iran and preventing any financial transactions in US dollars.

39- It reiterates that the litigious contract required it to obtain a guarantee from an "international bank" and in dollar currency, which made the European, UN and international sanctions applicable and that it was impossible for it to fulfil its obligations, of which it informed the company N. during the performance of the contract and during the arbitral proceeding.

40- The company T. therefore considers that the award, which completely disregards the international sanctions, insofar as they constitute mandatory laws, is clearly against French international public order and must in this respect have recourse to cancellation. It is added that by disregarding the question, the award which is contrary to international sanctions against Iran is not likely to be implemented in France and therefore it is void.

41- **In response, the company N.**, who argues that the request by the company T. in reality hides a request to review the substance of the award, argues that no

flagrant or clear violation of public policy exists insofar as before its appeal for annulment, the company T. never pleaded illegality of the contract in view of the international sanctions but only the fact that they have made the performance of the contract difficult or even impossible in 2008 due to the difficulties that it faced to obtain the bank guarantees.

42- The company N. also adds that no effective and concrete violation of international public policy is characterised insofar as the award is not concerned by the sanctions invoked by the company T. , as the Resolution no. 1737 of 23 December 2006 and the Resolution no. 1747 of 24 March 2007 concern only the activities in relation with the nuclear sector and not the gas sector, and the Resolution no. 1803 of 3 March 2008 was only calling the financial institutions to be vigilant in their activities with the banks domiciled in Iran. It specifies that the Council Regulation (EC) no. 423/2007 of 19 April 2007 does not apply to the gas sector since it refers to nuclear activities of Iran and specifies that if the sanctions under the Council Regulation (EU) no. 961/2010 of 25 October 2010 applies to the gas sector, this regulation does not apply to the contracts entered into before 26 July 2010, which is the case of the contract in this matter.

43- The company N. also argues that the UN Security Council resolutions do not have a direct effect in France and that only the European or French transposition may be invoked before the French courts, without which they are only as legal facts and cannot be considered as mandatory law whose observation is necessary for protecting the pollical and social or economic organisation.

44- Concerning the impact of the American sanctions, the company N. argues that the American law has not title to intervene in this litigation and even less as an element of international public policy. It considers that these sanctions cannot be applied as foreign mandatory law being part of the international public policy because only the foreign mandatory law of the place of performance of the contract may be applied, in this case Iran and not the United States. It also states that if the litigation was submitted, on merits, before a French judge, it would not have been able to apply American sanctions as mandatory law and that the judge for annulment could not annul an award for the claimed violation of foreign rules that he did not apply if the merits of the litigation was submitted before him.

45- The company N. argues that in any case, the American sanctions, whose content is not justified with precision, cannot be acknowledged nor applied in France if their unilateral and extraterritorial nature is contested by the French authorities.

Therefore,

46- Under Article 1520,5° of the Civil Procedure Code the appeal for annulment is opened if the acknowledgement or implementation of the award is contrary to international public policy.

47- The court's control must not be on the arbitrators' assessment of the parties' rights with respect to the provisions of public order invoked but on the solution given to the litigation by the arbitration court, as the annulment of the award is incurred if its implementation is against the French concept of international public policy, which under Article 1520, 5° mentioned above, implies all the rules and values that the French legal order cannot disregard , even in situations that are international in nature.

48- Complying with the French concept of international public order implies that the reviewing state judge may assess, in law and in fact, the argument based on being contrary to international public policy, even if this argument was not raised before the arbitrators and that they did not include in the debate.

49- Thus, the fact that the company T. did not invoke international sanctions in support of a request to declare the litigious contract before the arbitrators as illegal does not exempt the judge from making such evaluation.

50- The question that the court must answer in this case is to know if the international sanctions invoked by the company T. are likely to be included within the French concept of international public policy and in case of a positive answer, if their disregard by the arbitration court is likely to caracterise in this matter an effective and concrete violation of this international public policy.

***On the integration of international sanctions against Iran in the French concept of international public policy the international public policy:***

*On the sanctions resulting from the United Nations Security Council's resolutions;*

51- In this matter, the company T. relies on the United Nations Security Council resolution no. 1737 of 23 December 2006, no.1747 of 24 March 2007 and no. 1803 of 3 March 2008.

52- It must be reiterated that the United Nations Security Council resolutions taken in compliance with Chapter VII of the United Nations Charter and notably its Article 41, which specifies the powers that are acknowledged to it in case of threat against peace or acts of aggression, constitute the norms of international law which is imposed on all the Member States under Article 25 of the United Nations Charter, which stipulates that the members of the organisation "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

53- The mere fact that the provisions of the United States Charter does not grant to these resolutions a direct effect on the national order of the Member States as long as the prescriptions that they enact have not been made mandatory or transposed in

national law, in itself is not sufficient to deny them any impact in this matter whereas it is not about assimilating these resolutions to French mandatory law but in this case to foreign mandatory law, or even really international mandatory law.

54- In this respect, the international sanctions resulting from the United Nations Security Council resolutions, insofar as they are imposed on the Member States and therefore on France, may be assimilated to foreign mandatory laws and/or really international mandatory laws, that cannot be ignored by an arbitration court if the litigious situation that it must rule on lies within the scope of these sanctions.

55- Moreover, the resolutions mentioned above, insofar as their purpose is to contribute to the peacekeeping or peacebuilding and to international security, carry the rules and values that the French legal order cannot disregard and therefore they lie within the French concept of international public policy.

*On the sanctions against Iran originating from European Union;*

56- It is not contested that sanctions against Iran were also taken by the European Union under the Council Regulation (EC) no. 423/2007 of 19 April 2007, Council Regulation (EU) no. 961/2010 of 25 October 2010 and Council Regulation (EU) no. 267/2012 of 23 March 2012 concerning the adoption of restrictive measures against Iran.

57- Such international sanctions thus transposed in the European Union and therefore in the French national legal order may be assimilated to French mandatory laws, and insofar as they aim to contribute to peacekeeping and peacebuilding and international security, they must also be integrated in the French concept of international public policy if the rules and values thus conveyed are a part thereof which the French legal order cannot disregard.

*On the sanctions against Iran originating from American authorities;*

58- In order to justify that the American sanctions were taken into account, the company T. reiterates the terms of the pleading that it filed before the arbitrators specifying notably that "the use of dollars (and the fact that the payment must necessarily go through the US banking system) made the operation eligible to American sanctions" without giving any precise information on the nature of these sanctions, nor their scope of material application and in time, essentially relying on the expertise of Mr. (C) during his hearing by the arbitration court and the legal opinion of Professor (B) issued on 12 January 2020.

59- During his hearing by the arbitration court, Mr. (C) didn't describe the American sanctions as such but mainly their effects on the financial transactions when these are denominated in US dollars such that the company T. argued the theory according to which "the situation on the financial markets does not allow to

easily work in USD and the banking community has serious difficulties in proceeding with payments in USD".

60- In his legal opinion, Professor (B.) describes the American sanctions in more details by listing them, without however the company T. providing the legal provisions, and considers that "there is no doubt that the various programmes of US sanctions aiming Iran constitute American mandatory laws".

61- However, a foreign mandatory law may be seen as coming under French international public policy, only insofar as it carries the values and principles that cannot be disregarded by this international public policy even in an international context.

62- It should be noted that unilateral sanctions taken by the American authorities against Iran cannot be considered as the expression of an international consensus.

63- While the French concept of international public policy aims to preserve some fundamental values or policies "of the forum", the extraterritorial scope of the sanctions pronounced by the American authorities is specifically contested both by the French authorities and the European Union.

64- Thus, several ministerial responses provided in the debate and originating from the Ministry of Europe and Foreign Affairs and the Ministry of Economy and Finance, respectively published in the official gazette of the French Republic on 13 August and 15 October 2019, reiterate that "*the increasing recourse, by the United States, to extraterritorial provisions in matter of international financial sanctions and fight against corruption is unjustified, unjustifiable and contrary to international law*".

65- In his response to the question no. 18582 published on 13 August 2019, the Minister of Europe and Foreign Affairs specifies that "*The Government undertook to mobilise our European partners to reinforce the economic sovereignty of the European Union and endeavours through the extension of the scope of application of the European Regulation no. 2271/96 called "blocking statute" and more general reflexions on European sovereignty*".

66- Similarly, in his response to the written question no. 19280 published on the same day, the Minister of Economy and Finance specified that "At the national level, in order to face the procedures giving effect to extra-territorial legislations, France has a tool for control of information transmitted to foreign authorities: law no. 68-678 of 26 July 1968, called "blocking statute". The latter will be reinforced to regulate further the transmission of information to foreign authorities, notably to protect the strategic interests of our economic operators. The author of the question emphasises that all these formalities take time and raises the question of the relevance to act at the European level to respond to the challenges of fight against

the extra-territoriality of the American law. These works, which require an engagement at the highest level of our partners, requires time. However, the Government is convinced that given the size of the task, it is only by joining our efforts at national and European levels that we will efficiently be able to protect our operators who act in full compliance with the European and international laws. The European Union must be able to be free to trade legitimately with the entities and with the countries that it wishes, without the extra-territorial provisions hindering its economic operators. It is a question of European sovereignty".

67- It appears from these elements coming from the high representatives of the French Republic that the sanctions by American authorities against Iran, even if they are to be applied outside the USA, cannot be attached as such to the rules and values which cannot disregarded by France, and therefore cannot be included in the French concept of international public policy within the meaning of Article 1520,5° mentioned above.

68- Consequently, the alleged disregard by the arbitration court of the American sanctions mentioned above cannot be usefully asserted in support of a ground for annulment of the award on the basis of disregard of Article 1520, 5° of the Civil Procedure Code.

***On the assessment of an effective and concrete violation of French international public policy by the arbitration court with respect to not taking into consideration the international sanctions by the United Nations and European sanctions pronounced against Iran;***

69- It is not contested that the arbitration court did not take into account for issuance of its award the sanctions against Iran resulting from the United Nations Security Council resolutions and the European Union regulations.

70- It is therefore for the court to check if the solution resulting from the arbitral award which did not take these sanctions into account, must be annulled for having disregarded the international public policy it being specified that the award cannot however result only from the fact that the arbitration court did not take into account, even as legal facts, insofar as in order to carry this consequence, the violation of the international public policy must be effective and concrete and must therefore be assessed according to the material and temporal scope of application of the invoked sanctions.

*On the alleged violation of the international public policy with respect to the sanctions imposed by the United Nations Security Council;*

71- The company T. invokes the United Nations Security Council resolutions no. 1737 of 23 December 2006, no.1747 of 24 March 2007, and no. 1803 of 3 March 2008.

Resolution no. 1737:

72- It appears from the resolution no. 1737 of 2006 that it aims to impose on Iran "to suspend without further ado the nuclear activities posing a risk of proliferation' and specifically: "a) Any activities related to enrichment and reprocessing, including the research and development under verification of IAEA; and b) The works on any projects related to heavy water, including the construction of a reactor moderated by heavy water, also under verification of IAEA".

73- Under the terms of this same resolution, the States were called to take "the necessary measures to prevent the direct or indirect supply, sale or transfer to, or for the use in, or benefit of Iran, by nationals of Member States or through the territories of Member States, or using their flag vessels or aircraft, of items, materials, equipment, goods and technology, whether or not coming from their territory, that could contribute to enrichment-related, reprocessing or heavy water-related activities, to development of nuclear weapon delivery systems, i.e.: [...]".

74- Thus, it appears from these elements that this resolution is confined only to the nuclear and armament activities.

75- None of the other points covered by this resolution allow to conclude its application for the contract that gave rise to the litigation subject to arbitration which concerns the gas sector it being observed that if Article 9 of the resolution provides for a regime of specific prior authorisation notably to exclude assistance for food, agricultural, medical or other humanitarian purposes, a wider scope of application than the nuclear activities cannot be concluded insofar as this Article 9 only stipulates that "the measures prescribed in paragraphs 3, 4 and 6 above shall not apply when the Committee determines in advance and on a case-by-case basis, such that the offer, sale, transfer or provision of such items or assistance would clearly not contribute to the development of Iran's technologies in support of its proliferation sensitive nuclear activities and of development of nuclear weapon delivery systems, including where such items or assistance are for food, agricultural, medical or other humanitarian purposes, provided that (...)" and therefore these provisions shall not carry the consequence that the company T. wishes to give to them.

Resolution no. 1747:

76- It appears from the submitted documents that this resolution no. 1747 lies within that of 2006 (1737) that the Security Council is "resolved" to give effect, and is committed essentially extend the list of "persons and entities" that are subject to the sanctions and imposes embargo on conventional weaponry such that it does not cover the gas sector for these provisions.

77- Even if this resolution also requires "*all the States and international financial institutions not to make any new commitments for granting of subsidies, financial assistance and loans with liberal conditions to the Government of the Islamic Republic of Iran, if it is not for humanitarian and development purposes*", nothing allows to conclude that the subject matter of the litigious contract lies under the prohibition thus made.

Resolution no. 1803:

78- Finally, although the resolution no. 1803, also invoked by the company T. argues that the States must "*be vigilant concerning the activities carried out by the financial institutions located in their territory with all the banks domiciled in Iran ...*", it also covers the scope of nuclear activity, reasserting in preamble notably "*its attachment to the Treaty on the Non-Proliferation of Nuclear Weapons as well as the necessity for all the States that are parties to this Treaty to scrupulously fulfil all their obligations thereunder, and reiterates the right of the Member Parties to develop, in compliance with Articles I and II of this instrument, research, manufacturing and use of nuclear energy for pacific use without discrimination*". Moreover Articles 9 and 10 of this resolution are drafted as follows:

"*9. Calls upon all States to exercise vigilance in entering into new commitments for public provided financial support for trade with Iran, including the granting of export credits, guarantees or insurance, to their nationals or entities involved in such trade, in order to avoid such financial support contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems, as referred to in resolution 1737 (2006);*
*10. Calls upon all States to exercise vigilance over the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad, in order to avoid such activities contributing to the proliferation sensitive nuclear activities, or to the development of nuclear weapon delivery systems, as referred to in resolution 1737 (2006)*".

79- It clearly appears from these provisions that their scope concerns financing of nuclear activities, it being observed that these financing activities are not prohibited from the outset, as the Security Council calls on the States to exercise 'vigilance".

80- With respect to all these elements, not taking the resolutions mentioned above into account by the arbitration court whereas the litigious contract concerns gas sector and not nuclear activity, in any case does not allow to characterise an effective and concrete violation of the French international public policy.

*On the alleged violation of the international public policy with respect to the sanctions by the European Union:*

81- In support of its argument, the company T. invokes the Council Regulation (EC) no. 423/2007 of 19 April 2007 concerning the adoption of restrictive measures against Iran and the Council Regulation (EU) no. 961/2010 of 25 October 2010 concerning the adoption of restrictive measures against Iran and repealing the Council Regulation (EC) no. 423/2007 and the Council Regulation (EU) no. 267/2012 of 23 March 2012.

82- It must be observed that the Council Regulation (EC) no. 423/2007 of 19 April 2007 concerning the adoption of restrictive measures against Iran, takes over the scope of the United Nations Security Council resolution no. 1737 of 23 December 2006 mentioned above to which it expressly refers in its recitals, which is limited, as it is shown above, only to nuclear activities and weapons.

83- Therefore, the Council Regulation (EC) no. 423/2007, relying on the said resolution, also concerns only the nuclear and weaponry sectors without concerning storage of gas, as the materials and goods identified in the annexes of this regulation are those related to nuclear and weapons and notably concerned "nuclear materials, facility and equipment", "materials, chemicals, micro-organisms and toxins" or "navigation and avionics".

84- It appears from it that failure by the arbitration court to take this (EC) regulation into account, although it comes under the international public policy, cannot characterise, with respect to its scope of application, an effective and concrete violation of this international public policy within the meaning of Article 1520,5° of the Civil Procedure Code.

85- Concerning the Council Regulation (EU) no. 961/2010 of 25 October 2010 regarding the adoption of restrictive measures against Iran and repealing the Council Regulation (EC) no. 423/2007, it must be observed that its purpose was, as it is mentioned in its recitals no. 1, to draw conclusions from the Council decision of 26 July 2010, having "*approved Decision 2010/413/CFSP confirming the restrictive measures taken since 2007 and providing for additional restrictive measures against the Islamic Republic of Iran in order to comply with UN Security Council Resolution 1929 (2010), as well as for accompanying measures as requested by the European Council in its Declaration of 17 June 2010*".

86- As its recitals no. 2 mentions, "*Those restrictive measures comprise, in particular, additional restrictions on trade in dual-use goods and technology, as well as equipment which might be used for internal repression, restrictions on trade in key equipment and technology for, and restrictions on investment in the Iranian oil and gas industry, restrictions on Iranian investment in the uranium mining and nuclear industry, restrictions on transfers of funds to and from Iran, restrictions concerning the Iranian banking sector, restrictions on Iran's access to the insurance and bonds markets of the Union and restrictions on providing certain services to Iranian ships and cargo aircraft*".

87- In particular, Article 11 § 1 of this regulation stipulates that "*The following shall be prohibited:*
*(a) the granting of any financial loan or credit to any Iranian person, entity or body referred to in paragraph 2;*
*(b) the acquisition or extension of a participation in any Iranian person, entity or body referred to in paragraph 2;*
*(c) the creation of any joint venture with any Iranian person, entity or body referred to in paragraph 2.*
*(d) the participation, knowingly and intentionally, in activities, the object or effect of which is to circumvent the prohibitions referred to in points (a), (b) and (c)*".

88- Article 11 § 2 specifies that "*The prohibition in paragraph 1 shall apply to any Iranian person, entity or body engaged: (...) c) in the exploration or production of crude oil and natural gas, the refining of fuels or the liquefaction of natural gas*".

89- It is therefore an established fact that this regulation does concern the sector of activity in gas such that by its subject matter the litigious contract that gave led to the arbitral award was likely to lie within its scope of application.

90- However, under Article 14 of this same regulation, "*Article 11, paragraph 2, point c), shall not apply to the granting of a financial loan or credit or to the acquisition or extension of a participation , if the following conditions are met:*
*(a) the transaction is required by an agreement or contract concluded before 26 July 2010; and*
*(b) the competent authority has been informed at least 20 working days in advance of that agreement or contract*".

91- Thus, the litigious contract signed on 6 March 2002 and terminated on 26 August 2008 does not lie within the temporal scope of the restrictive measures provided for by this European Regulation.

92- This point has been confirmed by the Court of Cassation in the litigation between the parties concerning the implementation of the bank guarantees, as the Court of Cassation dismissed the appeal made by the company T. against the order of the Court of Appeals of Paris after having asserted that "the instruments of partial performance of the basic contract, and its termination are prior to the date of coming into force of the Regulation no. 961/2010 of 25 October 2010".

93- The same is true for the Regulation no. 267/2012 of 23 March 2012 concerning the adoption of restrictive measures against Iran and repealing the Council Regulation (EU) no. 961/2010, from which it absolutely does not result, and it is not even supported, a retroactive application to the contracts concluded in 2002 and terminated in 2008.

94- It appears from these elements that the fact that the arbitration court did not take this (EU) Regulation into account cannot characterise either, considering the scope of application thereof in time, an effective and concrete violation by the solution resulting from the award that it gave, of the international public policy within the meaning of Article 1520, 5° of the Civil Procedure Code.

95- It appears from all these elements mentioned above that the argument of violation of the international public policy is unfounded and that therefore it must be dismissed.

***On the compliance with the adversarial principle (1520-2° and 1520-4° of the Civil Procedure Code)*:**

96- **The company T.** considers that the arbitration court did not respect the adversarial principle by showing itself clearly in favour of the respondent.

97- It notably argues that the arbitration court admitted late documents from the company N. in the proceeding, i.e. slides that were not submitted to it in advance and the documents that were provided late in November 2017 by the company N.

98- It adds that the arbitration court used some information ("A. transactions") raised during the hearing by the arbitrator Mr. (G) appointed by the company N. which were not submitted in the adversarial debate without calling the parties to express themselves on this point, nor giving the possibility to verify the relevance, whereas the arbitrators are prohibited from raising the arguments on fact or law without calling the parties to comment on them under the adversarial principle.

99- It also states that the arbitration court settled the question of liability and costs of the wells no. 4, ignoring the evidences provided by the company T. and by basing itself exclusively on the elements submitted by N., a question that later got a dissenting opinion, challenging the arbitration court's impartiality.

100- Finally, the company T. indicates that the arbitration court ordered T. to pay 70% of the arbitration costs, whereas it supplemented the company N. for advance of costs asked by the ICC and the costs for hearing and therefore the decision on the costs of the proceeding does not respect the principle of equality of arms and doubts the court's impartiality.

101- In response, the company N. argues that neither the use of the slides during the hearing or the use of some elements by the arbitrators, or the distribution of the arbitration costs characterises a violation of the adversarial principle.

102- With regard to the use of the slides during the hearing, the company N. indicates that during the hearing, the president of the arbitration court asked the company T. to oppose to the use of the slides, which the latter did not do and that

these were not used during the hearing. It therefore considers that it is considered to have renounced from availing itself of it.

103- With regard to the submission of the documents by the company N. during the proceeding, the company N. states that the documents that it provided alleged to be late, were submitted on 15 December 2017, i.e. on the "cut off" date for submission of documents and that the company T. was authorised by the arbitration court to add documents during the hearing such that the court took the measures to ensure equality of the parties.

104- With regard to the use by the arbitrators of documents not submitted to both parties, the company N. argued that the element raised by the arbitrator (the "A. transactions"), was raised during the hearing and that the court asked the company T. to respond on this new element, which it did not do, it being observed that under Article 1466 of the Civil Procedure Code, since this company did not raise its allegations regarding the slides, provision of documents and use by the arbitrators of elements not submitted to both parties before the arbitration court, it must be deducted that it has renounced to avail itself thereof.

105- With regard to fact that the arbitration court would have settled the question of liability and costs of the well no. 4, ignoring the evidences provided by the company T., the company N. argues that the adversarial principle does not imply an obligation of the arbitration court to rely on each document provided by the parties or to explain why some documents are not retained by it in its reasoning but on the contrary, that it is enough that the parties could submit their documents in a debate held in the presence of both parties, which was indeed the case in this matter.

106- With regard to the distribution of arbitration costs, the company N. argues that it is about a sovereign decision of the arbitrators, unless there is a clause to the contrary and that in this case, the parties had given to the arbitration court the power to rule on the distribution of the arbitration costs.

Therefore,

107- The adversarial principle requires that the parties are able to make their claims in fact and in law, known and discuss those of their adversary such that nothing that that served as basis for the arbitrators' decision could escape an adversarial debate.

108- However, under Article 1466 of the Civil Procedure Code, applicable to international arbitration under Article 1506,3° of this code, "The Party who, with full knowledge of facts and without legitimate grounds, refrains from invoking in due time any irregularity before the arbitration court is considered as having renounced to avail itself from it".

***On taking the slides into account during the hearing:***

109- It appears from the award and the hearing transcription that if the company N. desired to present the slides about which the president observed that they were not communicated in advance, this issue was raised during the hearing and that after the arbitration court asked it to do so, the company N. specified the documents on which it relied during this hearing by referring exclusively to those that were communicated in advance and such that the argument errs in fact.

110- Moreover, if reference is made to a document whose communication involved a missing page, it also appears from the hearing transcription that the company T. was questioned on the difficulty and its objection, if any, and that it responded "I do not know the answer to this question" such that it did not raise any clear objection to the president's question and that therefore it waived with full knowledge of facts to avail itself from it and that it is therefore no longer admissible to avail before the annulment judge.

***On the late communication of the documents:***

111- It is not contested that on 15 December 2017, the company N. provided new documents.

112- However, on the one hand this communication did take place on the last date on which the communication of documents was allowed as per the timetable fixed by the court.

113- On the other hand, one month had passed between the provision of these documents and the date of the hearing leaving the possibility for the company T. to consult and respond to them.

114- Finally, the arbitration court allowed the latter to submit 29 new documents on the day of the hearing, without any opposition by the company N., it being observed that there were two more exchanges of pleadings after the hearing such that the parties were able to comment on and discuss all these new documents and therefore the adversarial principle was respected.

***On taking the elements into account that were not subject to adversarial procedure;***

115- It is established that an arbitrator cannot raise an argument on his own motion without the Parties have been able to comment on it, the arbitrator must keep the freedom during the hearing to ask any questions that he deems useful and relevant to understand the position of a party and notably ask the parties to provide explanations of fact that he considers necessary for resolving the litigation.

116- In this matter, the company T. reproaches one of the co-arbitrators of having raised the question of transactions that the company A. would have been able to conclude in Iran during the litigious period. even if this point was not raised by the parties and seems to come from the only arbitrator, the company T. was able to respond to it during the hearing specifying that it does not have any information on the subject and in any case had the possibility after the hearing to provide additional documents, which it did not deem fit to do such that it is considered to have renounced it.

***On the elements retained by the court to retain liability and costs of the well no. 4;***

117- In this matter, the reproach made to the arbitration court by the company T., on the fact that the arbitration court seems to have settled to question of liability and costs of the well no. 4, ignoring the evidence submitted by T. and basing itself exclusively on the elements submitted by N., does not characterise any violation of the adversarial principle but concerns the assessment by the court of the documents that were submitted to it.

118- The court of appeals in relation to the appeal for annulment cannot question such assessment with the risk of reviewing the award given.

***On the distribution of costs;***

119- It is within the assignment of the arbitration court to rule on the costs and their distribution between the parties, in compliance with Article 37 of the ICC Regulation.

120- The decision taken on these costs thus comes under a sovereign assessment of the arbitration court with respect to the circumstances of the litigation and the award that this court has given, which cannot be assumed by the only fact that it is disadvantages a party and cannot in any case lead the court of appeals, the annulment judge, to question it subject to reviewing the award.

121- It appears from all these elements that the argument of violation of the adversarial principle and lack of impartiality must be excluded.

122- It appears from the above that the appeal for annulment must be dismissed.

123- As per Article 1527 of the Civil Procedure Code, the dismissal of the appeal for annulment grants enforcement to the arbitral award.

***On the costs and expenses;***

124- The company T., the losing party, for legal costs.

125- Moreover, the company T. is convicted to pay to the company N., who had to incur irrecoverable costs to defend its rights, a compensation under Article 700 of the Civil Procedure Code which is fair to be fixed at 100,000 Euros.

## IV - ON THESE GROUNDS:

The Court,

1- Dismisses the appeal for annulment;

2- Grants enforcement order to the arbitral award given on 27 December 2018 under the aegis of the International Court of Arbitration of the International Chamber of Commerce (Case no.xx),

3- Convicts the company T. to pay to the company N. the sum of 100,000 Euros under Article 700 of the Civil Procedure Code;

4- Convicts the company T. for legal costs.

| ***Court Clerk*** | ***President*** |
| --- | --- |
| ***Clémentine GLEMET*** | ***François ANCEL*** |

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*I, the undersigned, Smita Mishra, Translator-Interpreter, Sworn before the Court of Appeals of Paris, professionally domiciled at 44 avenue du Président Kennedy, 75016 Paris (France), hereby certify that this document is a certified and accurate translation into English of the original multilingual document including French (copy attached).*
*Certification number: 3548-2020*
*Date: 20 November 2020*